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COMMENTARIES
ON THE LAW OF
PRIVATE CORPORATIONS

BY
SEYMOUR D. THOMPSON, LL. D.

IN SEVEN VOLUMES.

VOLUME VII.

A SUPPLEMENTARY VOLUME CONTAINING RECENT DECISIONS FROM
1895 TO 1899, AND ALSO A GENERAL INDEX
OF THE WHOLE WORK.

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PREFACE TO VOLUME SEVEN.

In this volume the author has made an attempt to bring the law down to the date of sending his manuscript to the printer, with reference to what seemed to him to be the more important topics involved in the law of private corporations; and to furnish a complete and exhaustive index to the whole work, together with a separate table of the cases examined and cited in this volume. It was found impossible to include in this volume all the topics germane to the subjects covered by the original work. The author therefore selected those which seemed to be of the greatest importance, with the hope of being able to include the others in a later supplemental volume. The index, which has been made by the author himself, will, it is thought, be found thorough and exhaustive,—presenting every subject under every title where any searcher could reasonably be supposed to look for it, and aiding him by copious cross-references. The use, in the index, of Roman numerals, to indicate in each case the volume in which the matter referred to is found, will render searches much quicker and easier. It is believed that the cases collected in the present volume, added to those collected in the original work, will swell the total number of cases examined and cited in the whole work to about 25,000.

The title on Building and Loan Associations is the work of that very thorough investigator and able writer, Hon. G. A. Endlich, a judge of the Court of Common Pleas of Pennsylvania, who will be recognized by the profession as author of an extensive work on the law of Building Associations, the second edition of which is now in the hands of Messrs. Soney & Sage, law publishers, of Newark, N. J. These gentlemen have courteously waived any

right of objection grounded upon their exclusive copyright in the second edition, to the publication of this very condensed *resume* of the subject in the present work: an examination of which will, no doubt, stimulate a desire in the reader to consult the larger work of Judge Endlich on the same subject.

The tedious work of exploring a great number of judicial decisions, of examining their details, of comparing and distinguishing them, which (with the exception of the title written by Judge Endlich), has been done by the author alone,—was entirely performed in The Law Library in Brooklyn. The tedium of that work was relieved by the hospitality which the author there received at the hands of the judges of the Supreme Court of New York, who are the trustees having the library in charge, and by the very kind assistance constantly rendered him by the librarian, Mr. Stephen C. Betts, and his assistant, Mr. Alfred J. Hook.

SEYMOUR D. THOMPSON.

35 NASSAU ST., NEW YORK, *June*, 1899.

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TITLE TWENTY.

RECENT DECISIONS ON THE NATURE
AND ORGANIZATION OF PRIVATE
CORPORATIONS.

TITLE TWENTY.

RECENT DECISIONS ON THE NATURE AND ORGANIZATION OF PRIVATE CORPORATIONS.

CHAPTER

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CHAPTER CCII.

NATURE OF CORPORATIONS AND PURPOSES FOR WHICH THEY MAY BE FORMED.

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§ 8140. What is a Corporation? — It was said by Magie, J., in giving the opinion of the Supreme Court of New Jersey, that "whether an aggregation of individuals united in an artificial body is a corporation or not, is to be determined rather by the *faculties* and *powers* conferred upon the body, than by the name or description given to it." It was accordingly held that the United States Express Company, though organized under the statute law of New York as a joint stock company or association, was to be deemed, for the purpose of being sued in New Jersey, a corporate entity,—not to be sued, as is usual, by its corporate name, but in accordance with the provision of its governing statute, by the name of its *treasurer*.¹ In various cases the same company, or similar companies, have been treated as corporations for such purposes as a controversy between a shareholder and the company;² for the purposes of taxation, with the conclusion that it was subject to a statute laying a tax upon its franchises and business, computable upon its capital stock;³ for the purpose of removing suits brought by or against it from a State court to a court of the

¹ Edgeworth v. Wood, 58 N. J. L. 468, 467; s. c. 33 Atl. Rep. 940; 3 Am. & Eng. Corp. Cas. (N. S.) 299.

² Waterbury v. Merchants' Union Exp. Co., 50 Barb. (N. Y.) 157; Westcott v. Fargo, 6 Lans. (N. Y.) 319;

s. c. aff'd, 61 N. Y. 542; (holding that a shareholder might sue the company at law, which he could not do if it were to be regarded as a partnership).

³ People v. Wemple, 117 N. Y. 136.

United States, on the ground that, being a corporation, it was, for the purposes of Federal jurisdiction, a "citizen" of the State creating it, without regard to the citizenship of its members;⁴ for the purpose of maintaining an action in the courts of the United States on the ground of diverse State citizenship;⁵ and, in the case of an English joint stock company, for the purpose of State taxation in this country.⁶ Speaking with reference to a *joint stock* corporation, the question "what is a corporation" was thus answered by Mr. Justice Williams, in giving the opinion of the Supreme Court of Pennsylvania: "A corporation is an artificial person, created by law as the representative of those persons, natural or artificial, who contribute to, or become the holders of shares in the property intrusted to it for a common purpose. As it is the creature of positive law, its rights, powers, and duties are prescribed by the law. Beyond the legitimate purposes which it was created to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus, a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad, or engage permanently in any other business than that for which it was created. It has neither the legal capacity nor the right to do so; and if it undertakes to go in any direction beyond its corporate powers, its acts are *ultra vires*. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law; and the best evidence of the existence of a corporation, is a grant of corporate powers by the Commonwealth."⁷ This definition, while in some respects inaccurate, is, on the whole, as good as judicial definitions usually are. It is inaccurate to say that the creation of a corporation "is not within the power of the individuals who subscribe to its stock." Nearly every State in the American Union has placed it within their power by passing general enabling acts under which corporations are formed by the mere voluntary action of the prescribed number of adventurers, with nearly the same facility as a partnership is formed. Nor is it altogether accurate to say that "the

⁴ *Fargo v. McVicker*, 55 Barb. (N. Y.) 437. ⁵ *settis*, 10 Wall. (U. S.) 566; 1 Thomp. Corp., § 3.

⁶ *Maltz v. American Express Co.*, 1 Flipp. (U. S.) 611; *Fargo v. Louisville & C. R. Co.*, 6 Fed. Rep. 787. ⁷ *Re Gibb's Estate*, 157 Pa. St. 59, 69; s. c. 22 L. R. A. 276, 281; 27 Atl. Rep. 383; 24 Pittsb. L. J. (N. S.) 135; 33 W. N. C. (Pa.) 120.

⁸ *Liverpool Ins. Co. v. Massachu-*

creation of a corporation is exclusively the work of the law, and the best evidence of the existence of a corporation is the grant of corporate powers by the Commonwealth." The creation of private corporations is *never* exclusively the work of the law, but is always the concurring work of the law and of private adventurers forming themselves into a corporation either under a special charter procured by them from the legislature, or — what is now the almost universal method — by an organization, under a general enabling act already in existence. If this is not so, what becomes of the maxim, so often repeated by the judges with reference to private corporations, that no man can be forced into such a corporation against his will?⁸ Nor is the grant of corporate powers by the Commonwealth the best evidence of the existence of a corporation; nor is it any evidence at all of such existence, without more. On the contrary, two elements of proof are necessary in order to establish the existence of a corporation: 1. The grant of a charter, or the existence of an enabling statute. 2. An organization or *user* thereunder.⁹

§ 8141. Further of the Attributes of a Corporation.— The celebrated definition of a corporation, given by Mr. Chief Justice Marshall in the Dartmouth College decision,¹⁰ has been often quoted with approbation by judges in subsequent cases: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."¹¹ These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual.

⁸ 1 Thomp. Corp., § 52.

⁹ 6 Thomp. Corp., § 7689. When the legal fiction that a corporation is a legal entity, distinct from the persons who compose it, may be disregarded: *Sportsman Shot Co. v. American Shot &c. Co.*, 30 Ohio L. J. 87; *State v. Standard Oil Co.*, 49 Oh. St. 137; s. c. 15 L. R. A. 145; 30 N. E. Rep. 279; 11 Rail. & Corp. L. J. 229; 36 Am. & Eng. Corp. Cas. 1.

¹⁰ See 1 Thomp. Corp., § 2.

¹¹ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636. This part of the definition was quoted with approbation by Taney, C. J., in *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 587. It was also quoted by Mr. Justice Daniel in his dissenting opinion in *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, 337.

They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."¹² In *Chicago &c. R. Co. v. Union Pac. R. Co.*,¹³ Mr. Justice Brewer quoted the following *dictum* of Mr. Justice Story in the *Dartmouth College* case, with reference to the attributes of a corporation aggregate: "Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members."¹⁴ In *Union Pacific R. Co. v. Chicago &c. R. Co.*,¹⁵ the *Dartmouth College* case is cited to the

¹² *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636. The entire passage was quoted *arguendo* by Mr. Justice Wayne in giving the opinion of the court in *Louisville &c. R. Co. v. Letson*, 2 How. (U. S.) 497, 558, in favor of the proposition that a corporation may be regarded as a "citizen" within the meaning of the Federal Constitution and judiciary act, for the purpose of Federal jurisdiction founded upon diverse State citizenship. It was quoted by Mr. Circuit Judge Gilbert in *United States v. Stanford*, 70 Fed. Rep. 346, 357-358; *Dillard v. Webb*, 55 Ala. 468, 474; *Ex parte Conway*, 4 Ark. 302, 351; *Deringer v. Deringer*, 5 Houst. (Del.) 416, 429; s. c. 1 Am. St. Rep. 150, 156; *Coyle v. McIntire*, 7 Houst. (Del.) 44, 88; s. c. 40 Am. St. Rep. 109, 114; *Macon &c. R. Co. v. Goldsmith*, 62 Ga. 463, 481; *Cutshaw v. Fargo*, 8 Ind. App. 691, 693-694; *Assurance Asso. v. Cole*, 26 N. J. L. 362, 365 (holding that "the great object of an incorporation is to bestow the character and properties of personalty and individuality upon the legal entity called the corporation as distinct from the persons of the incorporators"); *Thomas v. Dakin*, 22 Wend. (N. Y.) 9, 100 (referring especially to the quality of perpetual succession); *Warner v. Beers*, 23 Wend. (N. Y.) 103, 124, 143 (dealing with definitions of a corporation);

Curtis v. Leavitt, 15 N. Y. 9, 209, 257; *Waterbury v. Laredo*, 60 Tex. 519, 521; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 824; *Hope v. Valley City Salt Co.*, 25 W. Va. 789, 797; *Coite v. Society for Savings*, 32 Conn. 173, 185; *Higgins v. Downward*, 8 Houst. (Del.) 227, 240; *Land Grant Railway &c. Co. v. Coffey County*, 6 Kan. 245, 253; *State v. Stormont*, 24 Kan. 686, 690-691 (holding that "immortality is a legitimate attribute to be conferred on a corporation"); *Swan v. Williams*, 2 Mich. 427, 433; *Gifford v. Livingston*, 2 Denio (N. Y.) 380, 395 (in which Senator Hand adds his mite (might?) to the many attempts to define a corporation); *Codd v. Rathbone*, 19 N. Y. 37, 40 (holding that individuals engaged in the carrying on of the business of banking under the banking law of New York of 1838 are not corporations); *Charleston Ins. &c. Co. v. Sebring*, 5 Rich. Eq. (S. C.) 342, 346 (dealing with the definition of a corporation); *McCandless v. Richmond &c. R. Co.*, 38 S. C. 103, 110 (adding that "one of the rights conceded in this country to corporations is that of being a person in the eyes of the law").

¹³ 47 Fed. Rep. 15, 19.

¹⁴ Citing *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 667; quoted also in *San Luis Water Co. v. Estrada*, 117 Cal. 168, 177.

¹⁵ 51 Fed. Rep. 309, 324.

proposition that "the administration of the corporate powers of [a railroad company] was vested in the body of the stockholders, unless it had been delegated to some other body."¹⁶ Citing the Dartmouth College case as to the attributes of a corporation, the Supreme Court of Arkansas added: "Having its individuality conferred upon it by law, it unquestionably possesses all the attributes and properties of a natural person. It can acquire and transmit property according to the provisions of its charter, so long as it confines itself to the objects and purposes of the grant. To deny to a corporation, whether public or private, unless it is restrained by the provisions of its charter, the power of making an honest assignment of all its assets to pay its debts or creditors, is literally to disfranchise it of all its rights and privileges, and thereby to repeal the act of incorporation itself. Being a creature of law, so far as the investiture of the rights of its individuality goes, to that extent, and no more, it is placed on an equal footing with a natural person."¹⁷ The Dartmouth College case has been also quoted to the proposition — obviously sound — that the capacity conferred by a charter upon a corporation to take, etc., in perpetual succession refers to continuity of succession among its members rather than to duration of succession or immortality.¹⁸

§ 8142. Construction of Statutes and Charters Granting "Perpetual Succession."—The words "perpetual succession" in the charter on enabling act under which a corporation is organized, do not refer to the *duration* of the grant; but, where the life of the corporation is otherwise limited by the charter or statute, extends no further than to grant a *continuation* of corporate life during the period so prescribed.¹⁹

§ 8143. Distinction between Public and Private Corporations.—Old doctrines under this head have been reaffirmed to the effect that if a corporation is organized by private persons for *pecuniary gain*, it is to be deemed a private corporation, although,

¹⁶ Citing Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 677; citing also Attorney-General v. Davey, 2 Atk. 212.

¹⁷ Ex parte Conway, 4 Ark. 302, 352. The learned reader will perceive that the first sentence in the above quotation, except as qualified by the suc-

ceeding ones, is an extravagant absurdity.

¹⁸ State v. Payne, 129 Mo. 468, 478.

¹⁹ State v. Payne, 129 Mo. 468; s. c. 33 L. R. A. 576; State v. Hannibal &c. Gravel Road Co., 138 Mo. 332; s. c. 36 L. R. A. 457; 39 S. W. Rep. 910.

according to one judge, subject to the visitorial power of the State.²⁰ A corporation having a capital stock divided into shares, whose shares are held by individuals and not by the public, is deemed a private corporation, although it may be formed for a public object, or although it may be deemed an instrumentality for the promotion of the public health.²¹ This distinction relates chiefly to the inviolability of the charters of private corporations under the rule of the Dartmouth College case,²² and to the amenability of corporations created for public government to legislative control, under doctrine of the same case.²³ The language of Mr. Chief Justice Marshall, often quoted, on this head, was as follows: "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instrument of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, controllable by the legislature. The incorporating act neither gives nor prevents this control."²⁴ The distinction pointed out by Washington and Story, JJ., in the Dartmouth College case between public and private corporations as to the control of the legislature over them, has been reaffirmed in many cases, in some of which the above language of Marshall, C. J., has also been quoted.²⁵ The rule is now said to be "that a municipality, being

²⁰ *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153; s. c. 36 L. R. A. 55; 70 N. W. Rep. 68.

²¹ *Putnam v. Ruch*, 56 Fed. Rep. 416.

²² *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518.

²³ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 627, 629, 659-660, 661, 663, 694; *Hartford v. Hartford Bridge Co.*, 10 How. (U. S.) 511, 536; *Aspinwall v. Daviess County*, 22 How. (U. S.) 364, 367.

²⁴ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 638; quoted in *Frederick v. Groshon*, 30 Md. 436, 444-445; s. c. 96 Am. Dec. 591, 595, and in many other cases.

²⁵ *Laramie County v. Albany County*, 92 U. S. 307, 311; *Williamson v. New Jersey*, 130 U. S. 189, 199; *Essex Pub-*

lic School Board v. Skinkle, 140 U. S. 334; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 89; *Bonaparte v. Camden & C. R. Co.*, *Baldw.* (U. S.) 205, 223; *Sweatt v. Boston & C. R. Co.*, 3 Cliff. (U. S.) 339, 346, 353; s. c. 5 Nat. Bank. Reg. 234, 242 (holding that railroad corporations are private commercial corporations and subject to proceedings in bankruptcy); *Adams v. Boston & C. R. Co.*, 1 Holmes (U. S.) 30, 31; s. c. 4 Nat. Bank. Reg. 100; *Id.*, 2d ed., 314, 316 (same doctrine); *Allen v. McKean*, 1 Sumn. (U. S.) 276, 297, 301 (holding that Bowdoin College is a private, and not a public corporation); *Rundle v. Delaware & C. Canal*, 1 Wall. Jr. (U. S.) 275, 291 (learned opinion by Mr. Justice Grier, showing that a canal or navigation company is a private

a mere agent of the State, stands in its governmental or public character, in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation; while, with respect to

corporation and hence liable in damages for its torts); *University of Alabama v. Winston*, 5 *Stew. & P. (Ala.)* 17, 22 (holding that the University of Alabama was a public corporation and subject to legislative control); *Branch Bank v. Collins*, 7 *Ala.* 95, 101 (holding that a bank whose stock belongs exclusively to the State is a public corporation and subject to legislative control); *Mobile v. Stonewall Ins. Co.*, 53 *Ala.* 570, 577; *Wolfe v. Underwood*, 91 *Ala.* 523, 526; *State v. Curran*, 12 *Ark.* 321, 353 (holding that the State Bank of Arkansas was a public corporation and subject to legislative control—reversed in *Curran v. Arkansas*, 15 *How. (U. S.)* 304); *Wells v. Cole*, 27 *Ark.* 603, 611; *State v. Burk*, 63 *Ark.* 56, 64; *Hart v. Burnett*, 15 *Cal.* 530, 612; *Johnson v. People*, 6 *Colo. App.* 163, 167; *Hooker v. New Haven & Co.*, 15 *Conn.* 312, 322 (holding that a canal company is a private corporation); *Philadelphia & C. R. Co. v. Bowers*, 4 *Houst. (Del.)* 506, 529; *Coyle v. McIntire*, 7 *Houst. (Del.)* 44, 90; s. c. 40 *Am. St. Rep.* 109, 116; *Cotten v. Leon County*, 6 *Fla.* 610, 646; *Holland v. State*, 15 *Fla.* 455, 536; *State v. Knowles*, 16 *Fla.* 577, 616; *Cleveland v. Stewart*, 3 *Ga.* 283, 291, 292; *Dart v. Houston*, 22 *Ga.* 506, 529-534 (holding that the legislature has plenary power over the charter of an educational corporation which is endowed entirely by the State); *State v. Springfield Township*, 6 *Ind.* 83, 97; *Lucas v. Tippecanoe County*, 44 *Ind.* 524, 541; *State v. Carr*, 111 *Ind.* 335, 337 (*Indiana State University* a private corporation); *Regents v. Williams*, 9 *Gill & J. (Md.)* 365, 388, 402, 403; *Downing v. Indiana State Board of Agriculture*, 129 *Ind.* 443, 449 (*Indiana State Board of Agriculture* a private corporation); *Dubuque v. Illinois Central R. Co.*, 39 *Iowa*, 56, 94 (in the dissenting opinion of Cole, J.); *Louisville v. Louisville University*, 15 *B. Monr. (Ky.)* 642, 669; *Montpelier Academy*

v. George, 14 *La.* 395, 409; *Bradford v. Cary*, 5 *Me.* 339, 342; *Trustees v. Bradbury*, 11 *Me.* 113, 124; s. c. 26 *Am. Dec.* 515, 517, 518; *Yarmouth v. North Yarmouth*, 34 *Me.* 411, 417-418; s. c. 56 *Am. Dec.* 666, 669; *State v. Baltimore & C. R. Co.*, 12 *Gill & J. (Md.)* 399, 439 (holding that a provision in a railroad charter that "if the company shall not locate the road in the manner prescribed therein, it shall forfeit one million dollars for the use of the particular county, was not a contract between the railroad company and the county, such as the legislature could not impair, but was a penalty which the legislature might release at pleasure); *Baltimore v. State*, 15 *Md.* 376, 384, 491; *Frederick v. Groshon*, 30 *Md.* 436, 444; s. c. 96 *Am. Dec.* 591, 595; *Lake Roland & C. R. Co. v. Baltimore*, 77 *Md.* 352, 373 (holding that an ordinance authorizing a railroad company to lay double tracks on a side street may be repealed and the company restricted to a single track); *Hale v. County Commissioners*, 137 *Mass.* 111, 114 (holding that railroad corporations are private corporations); *Newcombe v. Boston Protective Department*, 151 *Mass.* 215, 217 (holding that a corporation consisting of an association of insurance companies for their mutual benefit, is a private corporation); *Swan v. Williams*, 2 *Mich.* 427, 433 (where corporations are divided into three classes); *University of Michigan v. Board of Education*, 4 *Mich.* 213, 225 (holding that "the institution was erected and has been supported by a public fund, and the corporators have no private interest whatever connected with their corporate character"); *State v. McFadden*, 23 *Minn.* 40, 43 (holding that the power of the legislature over counties is supreme); *Conner v. Bent*, 1 *Mo.* 235, 239; *St. Louis v. Russell*, 9 *Mo.* 507, 511; *State v. Garesche*, 36 *Mo.* 256, 260; *University of Nebraska v. McConnell*, 5 *Nebr.* 423, 427 (holding that the University

its private or proprietary rights and interests, it may be entitled to the constitutional protection." It was accordingly held that the city of New Orleans had no more right to claim an immunity from its contract with a water works company, whereby it might set off the taxes due to it from the water works company against the company's rates for water furnished to the city, and the substitution of a different scheme of payment in its place, than it would have had if the contract had been made directly between it and the city.²⁶ Citing the Dartmouth College case and many others, it was well said by Mr. Federal District Judge Billings that "a corporation whose shares are held by individuals, is a private corporation."²⁷ "If the corporation is not created for

of Nebraska is a public corporation, and subject to the control of the legislature); *Esser v. Spaulding*, 17 Nev. 289, 304; *Farnum's Petition*, 51 N. H. 376, 382 (holding that school districts are public corporations and subject to legislative control); *Wooster v. Plymouth*, 62 N. H. 193, 210; *Taylor v. Griswold*, 14 N. J. L. 222, 234; s. c. 27 Am. Dec. 33, 43; *Milburn v. South Orange*, 55 N. J. L. 254, 257; *Brick Presbyterian Church v. New York*, 5 Cow. (N. Y.) 538, 541 (holding that the obligee in a contract made by a municipal corporation is entitled to the same remedy as if the contract had not been made in its legislative capacity); *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9, 69; s. c. 31 Am. Dec. 313, 363; *Darlington v. New York*, 31 N. Y. 164, 194-195, 199; s. c. 88 Am. Dec. 248, 256, 260-261; *People v. Pinckney*, 32 N. Y. 377, 395; *People v. Morris*, 13 Wend. (N. Y.) 325; *Demarest v. New York*, 74 N. Y. 161, 166; *Columbus Mills v. Williams*, 11 Ired. Law (N. C.) 558, 564 (holding that the legislature has the power to abolish a county); *Gooch v. Gregory*, 65 N. C. 142, 144 (holding that an execution cannot be issued against a county); *Marietta v. Fearing*, 4 Oh. 427, 432 (holding that the legislature may change the charters of municipal corporations at any time); *Sloan v. State*, 8 Blackf. (Ind.) 361; *Portland &c. R. Co. v. Portland*, 14 Ore. 188, 193; s. c. 58 Am. Rep. 299, 301; *Smith v. Westcott*, 17 R. I. 366, 367-368 (holding that the com-

missioners of the "North Burial Ground" were a public corporation and subject to legislative control); *State v. Bank of S. C.*, 1 Spears L. (S. C.) 433, 502 (Harper, Chan., saying that, until the Dartmouth College decision, the definition of corporations into public and private had not been generally recognized, but that, previous to that time the general definition had been into eleemosynary and civil); *State v. Bank of S. C.*, 1 S. C. 63, 67 (holding that the Bank of South Carolina was a public corporation, its capital having been furnished by the State); *Lewis v. Whittle*, 77 Va. 415, 419 (medical college endowed by the State a public corporation); *Prince William School Board v. Stuart*, 80 Va. 64 (holding that a bequest to the vestry of a parish to be expended for the education of the poor of the county is subject to legislative control; but to the contrary see the dissenting opinion of Lewis, P., at page 73, referring to the Dartmouth College case at pages 74 and 80); *Wambersie v. Orange Humane Soc.*, 84 Va. 446, 453 (the same conclusion); *Wilson v. Ross*, 40 W. Va. 278, 282; *Burhop v. Milwaukee*, 21 Wis. 257, 260 (holding that railroad companies are private corporations).

²⁶ *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 91.

²⁷ *Putnam v. Ruch*, 56 Fed. Rep. 416, 418; citing also *Bank of U. S. v. Planters' Bank*, 9 Wheat. (U. S.) 904.

the administration of political power, or for purposes strictly incidental thereto, without the intervention of individual interests, by donations or otherwise, the corporation, although for public purposes, is a private corporation in law."²⁸

§ 8144. For what Purposes Public Corporations Deemed Private.— There is a doctrine, deduced from the Dartmouth College decision, not well established, but often in modern cases resisted, as it ought to be, under which the States have, to some extent, lost control of their own *public* institutions, the creature being placed above the creator. Roughly stated, it is that a municipal or other public corporation may be, with respect to certain of its property or rights *regarded as a private corporation*, in such a sense that an engagement in its favor by the State with reference to such property or rights will be beyond the reach of subsequent repeal or change without the consent of the corporation. Quoting the Dartmouth College case, the Supreme Court of Arkansas have made this concession: "It was indicated in the Dartmouth College case that the right of the legislature, as regards the property of municipal corporations, was broader than existed in the case of private corporations; and from that time to the present time has been a conceded principle. But it was said by different judges, in their separate opinions in that case, that the power of the legislature over the property of corporations purely public, was not absolute or unlimited; and while there are some later cases to be found that seem to question this view, it is generally approved, and it is now established that, though such property is subject to a very broad legislative regulation, its confiscation or diversion violates the provision relied upon."²⁹ This conclusion, which was pure *obiter*, may well be challenged. The law indeed recognizes two classes of rights in municipal corporations: the one class in the nature of private rights, involved in the management of property held by the corporation in its merely corporate capacity, and not as a governmental agency or for governmental purposes, in the management of which property it may be liable to private persons or corporations for the *negligence* of its

²⁸ Dixon v. People, 17 Ill. 191, 198; citing Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 668, and other cases.

²⁹ Pearson v. State, 56 Ark. 148, 152; s. c. 35 Am. St. Rep. 91, 92, 93; citing Park Commissioners v. Common Council, 28 Mich. 240.

officers, agents or servants; the other, public or governmental rights, relating to the care and management of property committed to it by the State for governmental purposes, in respect of which its officers and agents are deemed to be public officers and agents, in such a sense that it is not liable to private persons for their negligence. There is barely room for the view, with reference to property of this latter class, that private rights founded in municipal charters may exist which the State cannot control. But the doctrine is a dangerous one, as it trenches upon the sovereignty of the State, and it ought to be admitted with great caution.³⁰ The power of regulation at the mere pleasure of the legislature of the State seems to have no limit within the scope of municipal uses, and is restricted only when it attempts a total deviation. It affords a wide almost limitless field for legislative action. The legislature may do with the property whatever the municipality is bound to do, either at law or in equity; or whatever, upon recognized moral principles, ought to be done; and it has been held that it may do acts of charity or gratuity for the municipality, though this cannot be considered as established.³¹ Recognizing this distinction between public and private rights, the Supreme Court of California, in an opinion written by Mr. Chief Justice Field,³² have held that, in so far as municipal corporations are agencies of the State for the purposes of government, their charters may be qualified, enlarged, restricted or withdrawn at the discretion of the legislature; but when they are empowered to take and hold private property for municipal uses, such property is invested with the security of other private rights.³³ In 1885, the Court of Appeals of Kentucky, after an extensive examination of the *dicta* — for there was nothing else — in the Dartmouth College decision on the subject, fell into the mistake of holding “that a municipal corporation [the city of Louisville] may be capacitated to acquire property by its own means and for its own purposes, or for those of the corporators, and that the legislature cannot, in the exercise

³⁰ Baltimore v. State, 15 Md. 376, 385, 386.

³¹ Pearson v. State, 56 Ark. 148, 152; s. c. 35 Am. St. Rep. 91, 92, 93.

³² Afterwards and long a justice of the Supreme Court of the United States.

³³ Grogan v. San Francisco, 18 Cal. 590, 613. For the theory — believed

to be wholly untenable — that there may be property rights in a public corporation, such as a county, beyond the control of the legislature of the State, see the dissenting opinion of Buskirk and Pettit, JJ., in Lucas v. Tippecanoe County, 44 Ind. 524, 545, a case in which the whole question is shaken up, pro and con.

of its power over the corporation, divert such property from the uses of those at whose expense, and for whose use it was purchased." The result was that a University created by the city of Louisville, under authority received by the city from the State, was placed above the State itself, on the ground that the donation of property to it by the city was a contract which the legislature could not impair!³⁴ The doctrine that municipal corporations have two classes of powers with corresponding rights, public and private, was affirmed by the Supreme Court of Louisiana in 1874, and resulted in the conclusion that an act of the legislature of that State granting to a railroad company the right to erect and maintain a passenger depot on a certain portion of the levee, streets, and grounds in the city of New Orleans, within designated boundaries, was unconstitutional and void,³⁵—a seemingly untenable decision. This decision appears to have been rendered after a rehearing. In another case involving the same question, the court again reheard the matter and came to the conclusion that the legislature had such power.³⁶ Citing the Dartmouth College case, the Supreme Court of Michigan say that "the municipality, as an agent of the government, is one thing; the corporation, as the owner of property, is, in some particulars, to be regarded in a very different light. The Supreme Court of the United States held at a very early day that grants of property to public corporations could not be resumed by the sovereignty."³⁷ This strange doctrine has been carried so far as to hold that *counties*, which are mere local subdivisions of the State, can acquire property which, under the Constitution of the United States, is protected from arbitrary legislative interference.³⁸ In an early case in New Hampshire it was said, quoting the Dartmouth College case at

³⁴ Louisville v. University of Louisville, 15 B. Monr. (Ky.) 642, 674. See also Terrett v. Taylor, 9 Cranch (U. S.) 43, 52.

³⁵ New Orleans &c. R. Co. v. New Orleans, 26 La. An. 478, 482.

³⁶ New Orleans &c. R. Co. v. New Orleans, 26 La. An. 517, 521, 529 (two judges dissenting).

³⁷ People v. Hurlbut, 24 Mich. 44, 104; s. c. 9 Am. Rep. 103, 112; citing Terrett v. Taylor, 9 Cranch (U. S.) 43; Pawlet v. Clark, 9 Cranch, 292; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 694-698. See

also Richmond v. Lawrence County, 12 Ill. 1; Warren v. Lyons, 22 Iowa, 351; State v. Haben, 22 Wis. 660.

³⁸ State v. Foley, 30 Minn. 350, 357; citing the Dartmouth College case and (among other cases), the following: Hampshire v. Franklin, 16 Mass. 76; Atkins v. Randolph, 31 Vt. 226; People v. Batchellor, 53 N. Y. 128; People v. Ingersoll, 58 N. Y. 1; People v. Detroit, 28 Mich. 228; Richland County v. Lawrence County, 12 Ill. 1; Milwaukee Town v. City of Milwaukee, 12 Wis. 93, 100; State v. Haben, 22 Wis. 660; Milam County v.

page 529: "In the incorporation of a town, there is no implied power reserved to take its property arbitrarily and give it to another town. Corporations, both public and private, may be conceded to stand in this respect on the same ground with individuals."³⁹ In Mississippi the doctrine was carried to the wild length of holding that the legislature could not change the purposes for which money accruing to a municipal corporation from licenses granted for the sale of liquor, under its charter, ought to be applied.⁴⁰ The Supreme Court of New Hampshire have held that an assignment by the legislature of bonds to a town to reimburse the town for expenditures incurred for war purposes during the Rebellion, constituted an inviolable contract within the meaning of the Federal Constitution as interpreted in the *Dartmouth College* case.⁴¹

§ 8145. What may be Deemed an Educational Corporation.—

An association for the encouragement of teaching, reading and literature, and the encouragement of rational social amusements,

Bateman, 54 Tex. 153; *Grogan v. San Francisco*, 18 Cal. 590. See also *Whitfield v. Carrollton*, 50 Mo. App. 98, 102 (recognizing the distinction between liability for governmental and for private acts); *Bullmaster v. St. Joseph*, 70 Mo. App. 60, 65-70; *Millburn v. South Orange*, 55 N. J. L. 254, 257; *Bailey v. New York*, 3 Hill (N. Y.) 531, 539; s. c. 38 Am. Dec. 669, 672 (leading case recognizing the distinction between the ownership and care of property by municipal corporations for public or governmental purposes, and for private or corporate purposes); *Bloodgood v. Mohawk &c. R. Co.*, 18 Wend. (N. Y.) 9, 69; s. c. 31 Am. Dec. 313, 363; *Re Malone's Estate*, 21 S. C. 435, 449 (holding that a legislative grant of escheated property to the city of Charleston for the benefit of its orphan house could not be resumed by the State, even by a constitutional ordinance); *Woodfork v. Union Bank*, 3 Coldw. (Tenn.) 488, 499; *Brownsville v. Basse*, 36 Tex. 461, 501 (holding that a grant of land by the State to a municipal corporation created by it could not be repealed); *Galveston County v. Tankers-*

ley, 39 Tex. 651, 657 (holding that the title of a county to school lands granted by the State could not be divested by the legislature after patent issued); *Montpelier v. East Montpelier*, 27 Vt. 704, 710 (discussion); *Montpelier v. East Montpelier*, 29 Vt. 12, 19-20; s. c. 67 Am. Dec. 748, 751 (holding that a statute dividing an incorporated town could not be allowed to have any effect upon properties held by the town in trust for the specific purpose named in its charter, and which was not designed for its use as a municipal corporation); *White v. Fuller*, 38 Vt. 193; *Milwaukee Town v. Milwaukee City*, 12 Wis. 93, 103, 105, 108 (holding that the legislature cannot annex a portion of the land of one town to another).

³⁹ *Bristol v. New Chester*, 3 N. H. 524, 533, 535; again quoted by Smith, J., in his dissenting opinion in *Wooster v. Plymouth*, 62 N. Y. 193, 224-225; citing *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 663.

⁴⁰ *Aberdeen Female Academy v. Aberdeen*, 13 Smedes & M. (Miss.) 645, 647.

⁴¹ *Spalding v. Andover*, 54 N. H. 38, 56.

and the playing of ten-pins, chess, checkers, and other lawful games, having no pecuniary profit in view and no connection with any business purpose or politics, and whose articles provide that no saloon shall be kept in connection with it, and that no drinks shall be sold by it nor by any of its members,—has been regarded by the liberal genius of the Missouri judiciary as an educational corporation, in such a sense that it may become incorporated without the payment of the *tax* required by the Constitution of that State to be paid upon the formation of corporations “other than those formed for benevolent, religious, scientific, or educational purposes.”⁴²

§ 8146. What Educational Corporations are Private — what Public.— That a corporation created for the maintenance of a college for the dissemination of learning, whose funds are not supplied by public taxation, is a private corporation, was one of the propositions affirmed by the Dartmouth College decision,⁴³ and upon this point the decision has been often quoted and followed.⁴⁴ Such being its character, the conclusion followed, on the application of the doctrine of the

⁴² State v. LeSueur, 99 Mo. 552; s. c. 7 L. R. A. 734.

⁴³ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 542, 562.

⁴⁴ People v. Fitch, 154 N. Y. 14, 32; Drake v. Flewellen, 33 Ala. 106, 108; People v. Cogswell, 113 Cal. 129, 139; American Asylum v. Phoenix Bank, 4 Conn. 172, 177; s. c. 10 Am. Dec. 112, 113; Cleaveland v. Stewart, 3 Ga. 283, 291-292; Board of Education v. Bakewell, 122 Ill. 339, 344-345 (Normal University of Illinois a private corporation); Washington Home v. Chicago, 157 Ill. 414, 423 (Washington Home Association of Chicago a private corporation); Edwards v. Jagers, 19 Ind. 407, 413 (“County Seminaries” in Indiana private corporations, and not subject to be sold under a State law, and purchaser got no title); Kellum v. State, 66 Ind. 588, 597 (vested right of Vincennes University to maintain a lottery!); State v. Carr, 111 Ind. 335, 337 (holding that the State University of Indiana is a private eleemosynary corporation); Louisville v. University of Louisville, 15 B. Monr. (Ky.) 642, 669 (holding that the University of Louisville was a pri-

vate corporation, although a part of its funds were granted by the city or local public); Graded School District v. Bracken Academy, 95 Ky. 436, 443; Montpelier Academy v. George, 14 La. 395, 409; Trustees v. Bradbury, 11 Me. 118, 122, 124, 126; s. c. 26 Am. Dec. 515, 516, 517, 518, 519, 520 (holding that a public school, endowed by public lands, became a private corporation, and escaped the control of the State because it had been placed in the hands of a board of incorporated trustees); Regents v. Williams, 9 Gill. & J. (Md.) 365, 401; s. c. 31 Am. Dec. 72, 90, 92 (holding that the “Regents of the University of Maryland” were a private corporation); St. John’s College v. State, 15 Md. 330, 374; Sheriff v. Lowndes, 16 Md. 357, 376; Cary Library v. Bliss, 151 Mass. 364, 378 (Free Public Library a private corporation); Williams v. Williams, 8 N. Y. 525, 533; Chegaray v. New York, 13 N. Y. 220, 229 (defining the word “seminary”); Ohio v. Neff, 52 Oh. St. 375, 404, 405; Liggett v. Ladd, 17 Ore. 89, 99-100 (making the concession that if the State were to endow a college out of a trust fund be-

Dartmouth College case, that "the original founders are merged in the corporation; and henceforth it is to be subject to the general law of the land. Neither the original founders, nor the general assembly can rightfully exercise any authority over it, by exerting a control over these trustees, or appointing visitors for that purpose."⁴⁵ In *Vincennes University v. Indiana*,⁴⁶ quotations were made from the opinions of Chief Justice Marshall and Mr. Justice Story, to show the distinction between public and governmental corporations on the one hand, and private corporations on the other, with respect to their amenability to legislative control, with the conclusion that, while strictly public corporations, such as cities, towns, parishes and counties, are subject to legislative control, yet eleemosynary corporations whose property does not belong to the State are private corporations, and their charters are contracts between them and the State, and as such protected by the Constitution of the United States from invasion by the State legislature. And such, it was held, was the Vincennes University, a corporation created by the legislature of Indiana to receive a grant of lands from the United States for educational purposes. In the same case Mr. Chief Justice Taney dissented — and his dissent seems to have been well taken — on the ground that the University was a public corporation. He quoted the following from the language of Chief Justice Marshall in the Dartmouth College case: "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States."⁴⁷ "Here," continued Taney, C. J., "the funds are contributed entirely by the public for public purposes, and these appellants [Trustees of the University] have no private individual

longing to the State, the State would thereby acquire no authority to interfere with the charter of the college); *Brown v. Hummel*, 6 Pa. St. 86, 93; s. c. 47 Am. Dec. 431, 436; *Grammar School v. Burt*, 11 Vt. 632, 641; *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 476, 477 (a grammar school endowed by public funds a private corporation). Compare *Hale v. Everett* (*alias* *Everlasting*) 53 N. H. 9-276.

⁴⁵ *Fuller v. Plainfield Academic School*, 6 Conn. 532, 545.

⁴⁶ 14 How. (U. S.) 268, 276.

⁴⁷ *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 623.

interest, and allege none in their bill in behalf of themselves or others, which entitles them to maintain a suit against the State. They are public agents for a public purpose, and nothing more, and so describe themselves. The laws of the State, which directed the appropriation of the fund to the uses for which it was dedicated, are therefore constitutional and valid, under the decision referred to, and in my opinion the decree of the Supreme Court of the State [of Indiana] ought to be affirmed.”⁴⁸

§ 8147. **Distinction between Eleemosynary and Civil Corporations with Respect to the Visitorial Power.**—The distinction between *public* and *private* corporations which, as just seen, obtains in this country, does not exist in the English law; because, in that country Parliament being supreme, corporations of both classes are equally subject to legislative control. The leading division of corporations in the law of that country is into *eleemosynary* and *civil*. This distinction related to the right or power of *visitation*; and it was this: that, with respect to eleemosynary corporations, the right or power of visitation was in the trustees, subject to the superintendence of the Court of Chancery; whereas, with respect to civil corporations, it was in the Court of King’s Bench. It is scarcely necessary to add that in England joint stock corporations organized for pecuniary gain, which we class among private corporations, and which, under the law of that country, are for many purposes regarded as corporations,—nevertheless pass under the designation of “companies.” With respect to the visitorial power over corporations, the American doctrine is to the effect that where trustees or governors are incorporated to manage a charity, the visitorial power is deemed to belong to them in their corporate character.⁴⁹ The Dartmouth College case is authority for the proposition that the common law of England with regard to the visitation of corporations is in force in this country, except so far as modified by statute.⁵⁰ The doctrine, recognized by the Dartmouth College case, is that “the founder of a charitable institution has a right, in the first instance, by such orders and statutes as he may then make, or as he reserves the power to make, and afterwards in fact makes,

⁴⁸ Vincennes University v. Indiana, 14 How. (U. S.) 268, 281.

⁴⁹ Regents v. Williams, 9 Gill & J. (Md.) 365, 402, 403; s. c. 31 Am. Dec. 72, 92; citing Dartmouth College v.

Woodward, 5 Wheat. (U. S.) 518, 675, per Story, J.

⁵⁰ Murdock’s Appeal, 7 Pick. (Mass.) 303, 322.

within the limits of such reserved power, to direct how and in what mode his charity shall be administered: and, by the visitorial power which he may retain to himself, or his heirs, or delegate to other persons or bodies, to see that his will and purpose in creating the charity shall be observed and carried into effect, and to restrain mismanagement and correct abuses.”⁵¹ “Such a visitorial power extends to all cases not amounting in law to a breach of trust; and the decisions of the visitors within the scope of their authority are final.”⁵² It necessarily follows from this doctrine that a trustee in an eleemosynary corporation cannot be removed from his office by a mere act of the legislature; there must be a judicial proceeding adversary in its nature, and he must have his day in court and his opportunity to defend himself against the charges preferred against him.⁵³ Citing the Dartmouth College decision and other cases, the doctrine under this head was thus clearly expressed in a case in the Court of Civil Appeals of Texas by Williams, J.: “An individual who conveys property in trust for charitable purposes has, unless he should assign it to another, what is called the visitorial power, in the exercise of which he may prescribe rules for its management and for the administration of the trust, and may govern and control the trustees, inspect their proceedings, and correct abuses in their conduct. But this is a power which may be assigned; and the incorporation of trustees, under a charter which confers upon them * * * the full management of the property and of the institution, divests such right of the founder, and vests it, as well as the absolute title to the property conveyed, in the corporation.”⁵⁴ But with respect to *public* corporations the visitorial power is in the State.⁵⁵

§ 8148. An Incorporated Bank is a Private Corporation unless its Funds Belong to the State.—Among the exuberant *dicta* of the judges who wrote the opinions in the Dartmouth College case, are these, found in the opinion of Mr. Justice Story: “A bank, created by the government for its own uses, whose stock is ex-

⁵¹ Shaw, C. J., in *Nelson v. Cushing*, 2 Cush. (Mass.) 519, 529-530.

⁵² *Ibid.*, 531; citing *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 696, per Story, J. See also *Sanderson v. White*, 18 Pick. (Mass.) 328, 335; s. c. 29 Am. Dec. 591, 595.

⁵³ *State v. Adams*, 40 Mo. 570, 586.

See also *State v. Bryce*, 7 Ohio, Part 2, p. 82.

⁵⁴ *Trustees v. Hun*, 7 Tex. Civ. App. 249, 252.

⁵⁵ *Lewis v. Whittle*, 77 Va. 415, 419 (Medical College of Virginia, endowed by public funds, subject to State visitation).

clusively owned by the government, is, in the strictest sense, a public corporation. * * * But a bank whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature."⁵⁶ Quoting this language, Mr. Justice McLean said: "It by no means follows that because the action of a corporation may be essential to the public, therefore it is a public corporation. This may be said of all corporations whose objects are under the administration of charters. But these are not public, though incorporated by the legislature, unless their funds belong to the government. Where the property of a corporation is private, it gives the same character to the institution, and to this there is no exception."⁵⁷

§ 8149. What is a "Mechanical" or "Manufacturing" Corporation? — what not.— The Attorney-General of Pennsylvania has construed the term "mechanical business," as used in a statute of that State relating to the organization of corporations,⁵⁸ as referring to the employment of *skilled labor* in shaping materials into structures or products of utility, and not as incidental to one of the arts or professions. He consequently ruled that preparing and mechanically executing designs for decorating and furnishing buildings is not such a business; nor is dredging and excavating in rivers and executing submarine work.⁵⁹ The mining of iron ore is a "mechanical business" within the meaning of a constitutional provision granting exemption from superadded liability to stockholders of corporations organized for the purpose of carrying on "any kind of manufacturing or mechanical business."⁶⁰ A corporation organized to supply light by means of *electricity* is a manufacturing corporation within the meaning of a statute relating to taxation,⁶¹ and also within the meaning of a statute permitting one or more manufacturing corporations to consolidate.⁶² But a corporation

⁵⁶ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 669.

⁵⁷ State Bank v. Knoop, 16 How. (U. S.) 369, 380-381. Compare Curran v. Arkansas, 15 How. (U. S.) 304, where this doctrine seems to have been considerably modified.

⁵⁸ Pa. Act of Apr. 29, 1874.

⁵⁹ Mechanical Business Cases, 9 Pa. Co. Ct. 1.

⁶⁰ Cowling v. Zenith Iron Co., 65 Minn. 263; s. c. 60 Am. St. Rep. 471.

⁶¹ People v. Wemple, 129 N. Y. 543. That gas companies are manufacturing companies within the same statute, see Nassau Gas Light Co. v. Brooklyn, 89 N. Y. 409.

⁶² Beggs v. Edison Electric Light & Co., 96 Ala. 295; s. c. 11 South. Rep. 381.

formed under a statute authorizing the formation of corporations "for the purpose of collecting, storing and preserving *ice*, or preparing it for market or preserving * * * and vending the same," and whose business is confined to the purposes expressed in the act, is not a manufacturing corporation within a statute creating an exemption from taxation; otherwise, it is conceded, if it manufactures ice by artificial means.⁶³ "A manufacturer is not one who creates out of nothing, for that surpasses human power; neither is he one who produces a new article out of material entirely raw. He is one who gives new shapes, new qualities, to matter which has already gone through some artificial process." A *cooper* is therefore a manufacturer and taxable as such.⁶⁴ An *aqueduct* corporation is not a manufacturing corporation, and its pipes and appliances for purifying and controlling water supply are not machinery employed in manufacture within the meaning of a statute exempting the value of such machinery in the taxation of shares.⁶⁵ A corporation organized for the purpose of *mining coal* is not a manufacturing corporation within the meaning of a statute defining and regulating the enforcement of the liabilities of officers and stockholders of manufacturing corporations.⁶⁶ A corporation organized for the purpose of "constructing, using and providing one or more dry docks or wet docks or other conveniences and structures for building, raising, repairing or coppering vessels and steamers of every description," is not a manufacturing corporation within the meaning of a statute exempting such corporations from taxation.⁶⁷ A company organized for the purpose of manufacturing and supplying *gas* is entitled to the exemption from taxation granted by the laws of New York to "manufacturing corporations carrying on manufactures within this State."⁶⁸

§ 8150. For what Purposes Corporations may be Formed.—

Under an act authorizing the formation of corporations for trade or for carrying on any lawful mechanical, manufacturing or agri-

⁶³ *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

⁶⁴ *New Orleans v. LeBlanc*, 34 La. An. 596.

⁶⁵ *Dudley v. Jamaica Pond Aqueduct Corporation*, 100 Mass. 183.

⁶⁶ *Byers v. Franklin Coal Co.*, 106 Mass. 131.

⁶⁷ *People v. N. Y. Floating Dry Dock Co.*, 92 N. Y. 487.

⁶⁸ *Nassau Gas Light Co. v. Brooklyn*, 25 Hun (N. Y.) 567; *s. c. aff'd*, 89 N. Y. 409.

cultural business, a corporation may be formed for the purpose of buying, owning, improving, selling, and leasing lands, tenements, hereditaments, real, personal, and mixed estates, and property, including the constructing and leasing of a building.⁶⁹ A corporation for the sale of goods, mining supplies, etc., may be organized under U. S. Rev. Stat., § 1889, providing that the legislative assemblies of the several Territories may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other "industrial pursuits."⁷⁰ A corporation which has for its object the purchase of land and the construction of houses thereon,—the funds being realized from the capital stock paid in by subscribers in installments,—and finally the allotment of the lot and houses among the shareholders in satisfaction of their stock, is authorized under a statute,⁷¹ permitting any number of persons to become incorporated for the transaction of any lawful business.⁷² The provision of the Missouri statute,⁷³ authorizing the incorporation of companies for various purposes therein specified, and for any other purpose intended for pecuniary profit or gain not otherwise especially provided for, and not inconsistent with the State laws and Constitution,—is broad enough to authorize incorporation for the purpose of issuing and selling bonds to be redeemable at prescribed periods and in a prescribed order.⁷⁴ A *laundry* business, operated by the use of machines and mechanical instruments instead of manual labor, is within a statute,⁷⁵ providing for the incorporation of companies to do "mechanical business."⁷⁶ A corporation to buy and sell *stock, bonds, and public securities*, may be organized under the Pennsylvania statute authorizing companies for "trade and commerce."⁷⁷

⁶⁹ Finnegan v. Noerenberg, 52 Minn. 239; s. c. 18 L. R. A. 778; 53 N. W. Rep. 1150.

⁷⁰ Bashford-Burmister Co. v. Agua Fria Copper Co., (Ariz.) 35 Pac. Rep. 983.

⁷¹ Neb. Comp. Stat. chap. 16, § 123.

⁷² York Park Bldg. Asso. v. Barnes, 39 Neb. 834; s. c. 58 N. W. Rep. 440.

⁷³ Mo. Rev. Stat. 1889, § 2771, subd. 11.

⁷⁴ State v. Corkins, 123 Mo. 56; s. c. 27 S. W. Rep. 363; State v. Talbot, 123 Mo. 69; s. c. 27 S. W. Rep. 366.

⁷⁵ Pa. act April 29, 1874.

⁷⁶ Kenstone Laundry Co.'s Charter, 5 Pa. Dist. R. 735; s. c. 18 Pa. Co. Ct. 444.

⁷⁷ Re Pittsburgh Stock Exch., 26 Pitts. L. J. (N. S.) 308. That real estate, or land improvement corporations must, in California, be formed under Cal. Civ. Code, pt. 4, tit. 1, and not under pt. 4, tit. 16, § 639,—see Vercontere v. Golden State Land Co., 116 Cal 410; s. c. 6 Am. & Eng. Corp. Cas. (N. S.) 650; 48 Pac. Rep. 375.

§ 8151. What Corporate Purposes have been held not Unlawful.— In considering this subject, it should be borne in mind at the outset that, in every proceeding except where the rightfulness of the existence of the corporation is challenged by the State, the question whether the purposes for which it was formed were lawful purposes is to be decided by the description of those purposes given in the articles of incorporation;⁷⁸ and this has even been held in a proceeding by the State to dissolve a corporation.⁷⁹ In other words, when, on its face, the organization of a corporation is for a purpose not necessarily unlawful, it must be presumed that it was a purpose for which corporations might lawfully be formed.⁸⁰ This presumption obtains in the case of a foreign corporation; so that, if a corporation is permitted to exist and do business in the State of its incorporation, it will be presumed that it rightfully exists there, and the question of the lawfulness of the purposes for which it was formed will not be considered, unless they are shown to be contrary to the law of the forum.⁸¹ For example, a *vinegar trust* was incorporated under the laws of Illinois, the certificate of incorporation stating that the object of the corporation was to “buy and sell, deal in and handle vinegar.” It was held that this did not show on its face that the object of the incorporation was illegal, or necessarily inconsistent with public policy; and, although competent evidence was offered to show that such was the object of the incorporation, the court wriggled out of it, and cheerfully enforced the illegal contract by allowing the corporation to recover judgments against its stockholders on their contracts of subscription.⁸² Proof of printed prospectuses issued by the promoters of a trust, of a blank form of contracts to be used, and numerous acts and declarations made by them before the corporation was created, did not, in the opinion of the court, tend to show that the corporation was formed for an illegal purpose, because there was no proof that they were ever acted upon by the corporation itself

⁷⁸ *Detroit Driving Club v. Fitzgerald*, 109 Mich. 670; s. c. 67 N. W. Rep. 899; 4 Am. & Eng. Corp. Cas. (N. S.) 232.

⁷⁹ *Attorney-General v. Lorman*, 59 Mich. 157.

⁸⁰ *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 164.

⁸¹ *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537; *Demarest v. Flack*, 128 N. Y. 205.

⁸² *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 164; aff'g s. c. 74 Hun (N. Y.) 435.

after it came into existence.⁸³ In a subsequent case, such evidence was offered; but the court avoided its effect by such reasoning as the following: "The strongest way in which the case might be put for the defendants is that, subsequently to the incorporation of the plaintiff, there were corporate acts which showed or tended to show, a purpose of controlling the production and sale of vinegar and of regulating its cost, through combinations or agreements between those who were members of the company, and which would control their dealings with the public. In a certain sense, it might be said that that was in line with the projects of the promoters of the company; but that there was such an adoption or ratification of any illegal purpose or scheme, upon the formation of the plaintiff corporation, as to necessarily affect it with a vice which would taint contracts of subscription to the capital stock, cannot be said."⁸⁴ There was other reasoning in the case of the same weak character. What the court really held is doubtless well expressed in one of the paragraphs of the syllabus, thus: "When a person voluntarily subscribes to the capital stock of a corporation, his subscription must be assumed to have been made to enable the corporation to carry out the legitimate objects for which it was incorporated; and if the corporation afterwards departs from the purpose of its creation and enters upon illegal projects, this misconduct must be corrected in some other way than in a suit against the subscriber to recover his subscription." The anxiety of the court to find reasons to bolster up its conclusion is shown by the following passage: "Furthermore, if it were possible to assume the existence of an illegal transaction here, to which the plaintiff and defendants were parties, it would not be a case where the court would decline to lend its aid to the enforcement of the contract of subscription; for the rights of the creditors of this insolvent or embarrassed company have intervened. It would be highly inequitable that the defendants should escape and that the creditors of the company should suffer."⁸⁵ This statement unquestionably embraces a sound proposition; but, unfortunately for its application to the case in judgment, there is nothing in the reported facts of the case, or in the statement of facts made by the judge who wrote the opinion, to show that any creditor of the vinegar trust was before the court

⁸³ *United States Vinegar Co. v. Schlegel*, 143 N. Y. 537; *aff'g s. c.* 67 Hun (N. Y.) 356.

⁸⁴ *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 64.

⁸⁵ *Ibid.*, at page 65.

either in person or by a receiver, assignee, or other representative, asking that the illegal contract be enforced for his benefit. In Michigan, the purposes of an association which, as expressed in its articles, are the promotion of social intercourse among the members, and providing for them the convenience of a clubhouse, pleasure grounds, and proper facilities for improving, training, and exhibiting horses at meetings to be held at stated times in each year,—are lawful.⁸⁶

§ 8152. **Lawfulness of Corporate Object Determined by Articles of Incorporation.**—Upon the issue whether a corporation has been organized for a lawful purpose, the question will be determined by an inspection of the articles of the association, and not by the by-laws.⁸⁷

§ 8153. **Corporations formed “for any Lawful Business or Purpose Whatever.”**—Where an enabling statute authorizes the formation of corporations for enumerated purposes, and adds “or for any lawful business or purpose whatever, except,” etc., this last clause is not so construed as to authorize the formation of any and every kind of corporation for any or every kind of lawful business or purpose, but is restrained in its meaning by the principle *noscitur a sociis*, and merely authorizes the formation of corporations of a like kind, or for a like business or purpose, as those specifically authorized. Thus, if a statute authorizes the formation of telegraph corporations and adds the words above given in quotations, these words will authorize the formation of *telephone* companies; since they are of a like kind with telegraph companies.⁸⁸ On the other hand, where the *primary* object for which the formation of a corporation was attempted, was not authorized

⁸⁶ *Detroit Driving Club v. Fitzgerald*, 109 Mich. 670; s. c. 67 N. W. Rep. 899; 4 Am. & Eng. Corp. Cas. (N. S.) 546; 3 Detr. Leg. News, 232.

⁸⁷ *Detroit Driving Club v. Fitzgerald*, 109 Mich. 670; s. c. 67 N. W. Rep. 899; 4 Am. & Eng. Corp. Cas. (N. S.) 546; 3 Detr. Leg. News, 232. Compare *Attorney-General v. Lorman*, 59 Mich. 157.

⁸⁸ *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32. That a telephone company may be regarded as a telegraph

company, see *Attorney-General v. Edison Teleph. Co.*, 6 Q. B. Div. 244, where, as was said by Judge Cassoday, of the Supreme Court of Wisconsin, in the case just previously cited, Mr. Justice Stephen, who “unlike most American judges, seems to have sufficient time not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy definitive discussion of that subject.” *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32, 37.

by the statute law, the fact that some of the secondary objects enumerated in the articles were so authorized did not make the corporation lawful, notwithstanding the fact that the statute added to the enumerated objects for which corporations might be formed, the words "or for any lawful business or purpose whatever, except," etc. The latter clause, read with reference to the rule *noscitur a sociis*, was restrained so as to mean "any lawful business or purpose" of the kind for which the intended corporation was primarily designed.⁸⁹

§ 8154. Rule Where Primary Object is Unauthorized, but Incidental Objects are Authorized.—In considering whether a given corporation can lawfully exist, an important rule is that if its *primary object* is without statutory authority it can have no legal existence, even though among its declared purposes are some for the promotion of which the law permits corporations to be formed. Thus, a corporation whose primary object was to obtain money from its members by monthly payments and afterwards to distribute it again among them under a complicated scheme,—really a lottery scheme under the name of an "investment company,"—was held to be unauthorized, although some of its purposes, as set

⁸⁹ State v. International Investment Co., 88 Wis. 512, 519. Among the decisions in the same State on the principle *noscitur a sociis* in the construction of written instruments are: Blake v. Blake, 75 Wis. 339, 343; Wisconsin Central R. Co. v. Smith, 52 Wis. 140, 144 (not to a *penal* statute); Gibson v. Gibson, 43 Wis. 23, 33; Kelly v. Madison, 43 Wis. 638, 645 (concluding that the words "any claim or demand" in a charter provision requiring claims to be presented to the city council for allowance before bringing an action to enforce the same, do not include demands for *damages* for *torts*); Edson v. Hayden, 20 Wis. 682 (construing by this rule the meaning of the words "any other cause" in a statute giving a married woman the right to sue in her own name upon certain misconduct of her husband); Bevitt v. Crandall, 19 Wis. 581 (meaning of "other person" in a statute exempting personal property from execution); Cleaver v. Cleaver, 39 Wis. 96 (construing the word "relation" in a stat-

ute of wills); Campbell v. Campbell, 37 Wis. 206, 218 (construing the word "estate" in a statute relating to alimony); Attorney-General v. Railroad Companies, 35 Wis. 425, 519 (referring to the writs by which the court was authorized by the Constitution to exercise its superintending jurisdiction,—Chief Justice Ryan saying, "And, plainly recognizing the intention of the Constitution to vest in this court one jurisdiction, by several writs to be put to several uses, for one consistent, congruous, harmonious purpose, we must look at the writ of injunction in the light of that purpose, and seek its use in the kindred uses of the other writs associated with it. *Noscitur a sociis* is an old and safe rule of construction, said to have originated with as great a lawyer and judge as Lord Hale, peculiarly applicable to this consideration."); Morse v. Buffalo &c. Ins. Co., 30 Wis. 534 (insurance policy construed by reference to the principle *noscitur a sociis*).

forth in its articles, were "to encourage frugality and economy in its members; to create, husband and distribute funds from monthly installments, dues or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business." The reason was that, while some of the *secondary* objects thus set forth were warranted by the statute law of the State, the *primary* object, to obtain moneys from its members and to redistribute such moneys to them again, was not so authorized.⁹⁰

§ 8155. **Substantial Grounds on which Incorporation has been Refused to Organizations Formed for Social, Benevolent, or Religious Purposes.**— In Pennsylvania, the Courts of Common Pleas have refused to approve applications for charters of incorporation where the objects set forth could be accomplished just as well without incorporation,—as to a benevolent association having no capital stock, but depending solely upon contributions;⁹¹ or to an association formed to promote intercourse and friendship among accountants, and obtain employment for and assist members, where the proposed corporation is to have no capital and no shares;⁹² or for the cultivation and improvement of German manners and customs;⁹³ or to a political club, the court saying that "an ordinary political club has no right to be incorporated."⁹⁴ In the same State a charter will not be granted to a religious society where the purpose of the proposed corporation, as set forth in the application, is not only to educate the community to the importance of the recognition of certain ethical principles, but to establish a prescribed

⁹⁰ State v. International Investment Co., 88 Wis. 512.

⁹¹ Re St. John Baptist Beneficial Soc., 13 Mont. Co. L. Rep. (Pa.) 95.

⁹² Accountants' Asso. of Pittsburgh, 5 Pa. Dist. R. 699; s. c. 18 Pa. Co. Ct. 159; 27 Pitts. L. J. (N. S.) 103.

⁹³ Re Germania Saengerbund, 2 Pa. Dist. Rep. 73.

⁹⁴ Re Ton-a-lu-ka Club, (Pa. C. P.) 1 Pa. Dist. R. 460. In another case, in refusing to approve an application for the incorporation of a political club, the court said: "The law does not authorize the incorporation of political clubs, and in all reported cases the

courts have refused charters where the articles of association disclosed a political purpose:" Re Monroe Republican Club, 6 Pa. Dist. R. 515, 516; s. c. 28 Pitts. L. J. (N. S.) 52; 19 Pa. Co. Ct. 568. In another case, a charter was refused to a political club on the ground that it would be authorized to sell liquor without a license fee every day in the week, although the court was not informed as to the present intention of those managing the club as to the sale of liquor: Re Grant Club, 28 Pitts. L. J. (N. S.) 318; s. c. 20 Pa. Co. Ct. 592.

method of healing diseases of the body, including the most serious and fatal, to be carried into effect by persons trained for the purpose, who may receive compensation for their services, and are not qualified as required by the act of March 24, 1877, to practice medicine. At the same time, the courts of that State will not refuse a charter upon the view that the purpose of the organization is to inculcate a kind or form of worship which is improper; since, under the Constitution of that State, private belief is beyond public control, and there can be no interference with the rights of conscience.⁹⁵ In the same State, a charter was refused to a mutual benefit association whose proposed by-laws provided that the society's "official language is exclusively the Hungarian; the use of another language is not permitted, even as an exception."⁹⁶ It has been held in the same State that a charter will not be granted to religious societies, with power to dissolve ecclesiastical relations with central bodies at the will of a majority of the members, although the rights of the minority are to be protected by clauses providing for a division of church property.⁹⁷

§ 8156. **Substantial Grounds on which Incorporation for Business Purposes has been Refused.**— Under the Pennsylvania corporation act of 1874, charters have been uniformly refused to bodies seeking to become incorporated for business purposes, where the proposed charter set forth *more than one purpose*,— as the manufacture of gas meters, machines, and regulators, and also the purpose of dealing in any kind of goods at wholesale;⁹⁸ or the purpose of "manufacturing gas for illuminating," and also "manufacturing, leasing, buying, and selling of goods, materials, apparatus and appliances, with the right to acquire and hold patent

⁹⁵ Re First Church of Christ Scientists, 20 Pa. Co. Ct. 241; s. c. 6 Pa. Dist. Rep. 745.

⁹⁶ Charter of Saint Ladislaus, &c. Asso., 19 Pa. Co. Ct. 25.

⁹⁷ Re Zion Evangelical Church Charter, 8 Kulp (Pa.) 238; s. c. 5 Pa. Dist. Rep. 780. Compare Application for Charter, 17 Phila. (Pa.) 261. Nor will a charter be granted in that State to create a corporation which does not purport to be one not for profit, where the application provides for a capital

stock divided into shares, and such stock is wholly inadequate for the purposes stated, and the subscribers own all the stock, and there is no provision for new members, and if new members should be admitted they would have no shares of stock and would not be entitled to vote: Fort Washington Historical Soc., 20 Pa. Co. Ct. 84; s. c. 28 Pitts. L. J. (N. S.) 207; 1 Dauph. Co. Rep. 22.

⁹⁸ Re Application for Charter, (Atty.-Gen.) 5 Pa. Dist. R. 243.

rights for inventions and designs relating thereto, and receiving and granting licenses thereunder;"⁹⁹ or "the supply, storage or transportation of water and water power for commercial or manufacturing purposes;"¹⁰⁰ or for the manufacture and supply of *gas*, and for the supply of light and heat by *other means than gas*;¹⁰¹ or to supply *gas* to portions of *two* counties;¹⁰² or for carrying on "mechanical, mining, quarrying, and manufacturing business," although it was said that *two* of such pursuits may be so closely kindred and cognate as to authorize, under special circumstances, the formation of a corporation embracing both objects;¹⁰³ or for mining and boring for petroleum and natural gas, and for buying, selling, producing, storing, transporting and shipping the same, with the right to purchase land, etc., where the proposed charter asks for the additional privilege of a pipe-line company with the right of eminent domain under another statute.¹⁰⁴ Nor, under the Pennsylvania Act of 1895, permitting the creation of corporations for buying, selling, trading and merchandising at wholesale, can a corporation be organized not only for the manufacture of certain kinds of articles of commerce, but also for the purpose of dealing in any kind of goods, wares, and merchandise at wholesale; since this would warrant the corporation in engaging in any and all kinds of merchandising at wholesale, which the statute was understood not to warrant.¹⁰⁵

⁹⁹ Re McClurg Gas Construction Co., 4 Pa. Dist. Rep. 349.

¹⁰⁰ Sowego Water &c. Co. 4 Pa. Dist. Rep. 181. Afterwards the purpose of supplying water to the public was omitted, and the charter was refused on other grounds.

¹⁰¹ New Gas Light Co. (Ex. Dept.) 7 Pa. Dist. Rep. 151; s. c. 1 Dauph. Co. Rep. (Pa.) 22.

¹⁰² New Gas Light Co., *supra*.

¹⁰³ Re Newton Hamilton Oil &c. Co. (Atty.-Gen.) 10 Pa. Co. Ct. 452.

¹⁰⁴ Washington Mining &c. Co., 9 Pa. Co. Ct. 323.

¹⁰⁵ Re Charter Purposes, (Atty.-Gen.) 17 Pa. Co. Ct. 577. Nor can a charter be granted, under Pa. Act May 23, 1895, to a company whose purpose is stated to be *both* life and property insurance: Re Charter for Ins. Co., (Atty.-Gen.) 5 Pa. Dist. Rep. 315. Nor is the organization of corporations

for buying and selling vinous, spirituous, and malt liquors at wholesale, authorized by Pa. Act June 25, 1895, providing for the incorporation of companies for "buying, selling, trading, or dealing in any kind or kinds of goods, wares, and merchandise at wholesale." "The legislature has always dealt with the liquor traffic on a basis different from other kinds of business and trades": Re Pennsylvania Bottling &c. Co., (Atty.-Gen.) 6 Pa. Dist. Rep. 530; s. c. 19 Pa. Co. Ct. 593. A *partnership* formed simply for the purpose of being incorporated under the English Companies Act of 1862, in order that it may be forthwith *wound up*, and not for carrying on business, cannot be registered as a company under part 7 of the Act: Reg. v. Registrar of Joint Stock Companies (C. A.) (1891) 2 Q. B. 598.

§ 8157. **National Corporations.**—The constitutional doctrine has been reaffirmed in an opinion of Mr. Justice Gray, characterized by his learning and thoroughness, that Congress may create corporations as the appropriate means of executing any of the powers conferred by the Constitution upon the General Government.¹⁰⁶ Congress may, therefore, in virtue of its power to regulate commerce between the States, create a corporation to build a bridge across a navigable river separating two States,—as, for example, the North River Bridge Company, incorporated under an Act of Congress with power to construct a bridge across the Hudson River between the States of New York and New Jersey.¹⁰⁷ Moreover, where such a corporation is organized for a public purpose, Congress may undoubtedly confer the right of eminent domain upon it, without the consent of the States within which its works are to be established and carried on.¹⁰⁸

¹⁰⁶ *Luxton v. North River Bridge Co.* 153 U. S. 525; s. c. 38 L. ed. 808; 14 Sup. Ct. Rep. 891. See also 1 Thomp. Corp., § 670, *et seq.*; *McCullough v. Maryland*, 4 Wheat. (U. S.) 316, 411, 422; *Osborn v. Bank of U. S.*, 9 Wheat. (U. S.) 738, 861, 873; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18; *California v. Pacific R. Co.*, 127 U. S. 1, 39.

¹⁰⁷ *Luxton v. North River Bridge Co.*, 153 U. S. 525.

¹⁰⁸ *Luxton v. North River Bridge Co.*, *supra*; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Kohl v. United States*, 91 U. S. 367; *United States v. Fox*, 94 U. S. 315, 320; *United States v. Gones*, 109 U. S. 513; *United States v. Great Falls Man. Co.*, 112 U. S. 645; *Stockton v. Baltimore & C. R. Co.*, 32 Fed. Rep. 9, 19.

CHAPTER CCIII.

PROCURING THE CHARTER AND ORGANIZING THE CORPORATION.

SECTION	SECTION
8160. Acceptance of the charter or grant of franchises.	8168. Defects in applications or articles for which charters for ideal purposes refused.
8161. Until a charter or franchise tendered by the State has been accepted, it may be withdrawn.	8169. Defects in applications for charters for business corporations.
8162. Infants as corporators.	8170. Chartering corporations with franchises that conflict with exclusive franchises already granted to others.
8163. Married women as corporators.	8171. Signing and acknowledging the articles.
8164. When charters refused to aliens.	8172. Clerical form of the application: how written and put together.
8165. Organization of "one-man" and "two-men" companies.	8173. Amending applications for charters.
8165a. Evading constitutional requirements as to payment of tax.	8174. Rehearing after charter refused.
8166. Charters refused because containing unlawful provisions.	
8167. Charter prohibiting the use of the English language refused.	

§ 8160. **Acceptance of the Charter or Grant of Franchises.**—Whether a corporation is authorized under a general statute or a special charter, there must be an *acceptance* of the franchises tendered by the State before the corporation can be said to have a legal existence.¹ There is no difficulty in dealing with this question where the associates attempt to organize under a general enabling statute, because the mere making of such an attempt in good faith may well be regarded as an acceptance by them of the privileges tendered by the statute. Where the legislature of a State, by a special statute, incorporated the various branches of a "farmer's alliance," with the provision that the officers of each branch might immediately accept and adopt the act of incorporation, it was held that an unequivocal act of acceptance was neces-

¹ 1 Thomp. Corp., § 52; Durham Fertilizer Co. v. Clute, 112 N. C. 440; s. c. 17 S. E. Rep. 419.

sary to prevent the members from being liable for its debts as partners.² A corporation chartered by a statute which declares that "there is hereby incorporated" such corporation, without prescribing any conditions precedent, comes into being upon acceptance of the charter; and such an acceptance is sufficiently shown by proof that the act was passed at the request of the designated directors, or by its construction and use of part of its road.³ In case of a corporation organized under a special charter, where *one* of the persons named therein and *seven* not named met together without objection from the others, accepted the act of incorporation, adopted by-laws, chose officers and transacted business,—it was held that the persons who took part in these proceedings became a corporation under the name designated by the charter.⁴

§ 8161. **Until a Charter or Franchise Tendered by the State has been Accepted, it may be Withdrawn.**—A grant made by the State to individuals, of a charter, or of a corporate franchise of any nature, does not become operative until accepted in some form: until then, the protection of the Constitution of the United States, as judicially construed, does not extend to it, and it may be modified or withdrawn.⁵ An analogous distinction has been recognized between *perfected* and *inchoate grants*. Thus, it has been held that, with reference to a grant of lands to a county for school purposes, after patent issued, the county acquires a vested right to the lands which the legislature cannot recall,—yet until the title is so perfected, the grant may be recalled.⁶ But the distinction does not seem to

² Durham Fertilizer Co. v. Clute, 112 N. C. 440; s. c. 17 S. E. Rep. 419.

³ St. Joseph &c. R. Co. v. Shambaugh, 106 Mo. 557; s. c. 11 Rail. & Corp. L. J. 75; 17 S. W. Rep. 581.

⁴ McGinty v. Athol Reservoir Co., 155 Mass. 183; s. c. 29 N. E. Rep. 510.

⁵ Pearsall v. Great Northern R. Co., 161 U. S. 646, 677; reversing s. c. 73 Fed. Rep. 933; Central R. &c. Co. v. State, 54 Ga. 401, 422, 423. See also State v. Dawson, 16 Ind. 40; Kennebec Bank v. Richardson, 1 Greenl. (Me.) 79, 81; People v. Hoffman, 116 Ill. 587, 629 (in the dissenting opinion of Scholfield, J.); State v. Blake, 35 N. J. L. 208, 214; State v. Planters' &c. Ins. Co., 95 Tenn. 203, 206-207;

Yeaton v. Bank of Old Dominion, 21 Gratt. (Va.) 593, 598; Stephens v. Marshall, 3 Pinn. (Wis.) 203, 207, 208; Attorney-General v. Railroad Companies, 35 Wis. 425, 607 (holding that it was quite competent for the State Constitution to have repealed all laws to the contrary which had not ripened into contracts under the rule of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518).

⁶ Galveston County v. Tankersley, 39 Tex. 651, 658. The opinion is, on one point mere ignorance; since, from its very nature, a grant of land to a county for school purposes cannot be the subject of a vested right. *Ante*; § 8146.

be of the first importance in view of the well-settled principle that where deeds of grant are beneficial to the grantee, his *acceptance is presumed*. In like manner, it has been well held that, where a grant from the legislature is beneficial to a corporation, its acceptance is presumed.⁷

§ 8162. *Infants as Corporators.*—In Illinois, the fact that the articles of incorporation of a mutual benefit society provided that no person should be admitted to membership who was “under ten or over seventy years of age,” was held no ground in support of a proceeding by the Attorney-General to wind it up, the statute law being silent on the subject. The court saw no ground of objection to minors being members, except such as grew out of their inexperience and immaturity, and that objection would apply to many adults.⁸ The better opinion seems to be that taken by the Supreme Court of New York, which proceeds on the ground that, whereas the relations of the members of such a society among themselves rest upon mutuality of contract, persons whose executory contracts are void unless affirmed by them after coming of full age, are not to be admitted to membership, where the corporation is created under a statute providing that the corporators and those that may thereafter be associated with them shall be constituted a body politic and corporate.⁹ This question derives some aid from decisions which have been rendered under the English Companies Act 1862, where, unless a company has been validly constituted, it cannot be wound up as a registered company, but must be wound up as an unregistered company. In such a case, it was discovered, after a proceeding to wind up a company as a registered company had been commenced, that one of the seven persons (the minimum number necessary, under the statute, to sign the memorandum in order to entitle the company to registration) was, at the time of signing it, an infant. It was held that, as a certificate for the registration of the company had been issued by the proper official, the winding-up order was valid.¹⁰ In another such case, it was held by a single judge that the certificate of incorporation of a company is not invalidated by the fact that one

⁷ *Attorney-General v. Bank of Michigan*, Harr. Ch. (Mich.) 315, 326; citing *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 688.

⁸ *Chicago &c. Asso. v. Hunt*, 127 Ill. 257, 277.

⁹ *Re Globe Mut. Ben. Asso.*, 63 Hun (N. Y.) 263; s. c. 43 N. Y. St. Rep. 756; 17 N. Y. Supp. 852.

¹⁰ *Re Nassau Phosphate Co.*, 2 Ch. Div. 610, per Hall, V. C.

of the seven signers required by statute is an infant; since an infant's contracts are not void, but only voidable, and his subsequent avoidance of his contract will not affect the validity of the registration or of intermediate acts affecting third persons.¹¹ It will be perceived that these English decisions have no more than an analogy for the doctrine that a corporation may be regarded as existing *de facto*, for the purpose of safe-guarding the rights of private persons so long as the State does not intervene, although it may turn out that some of the required number of original incorporators were infants.

§ 8163. **Married Women as Corporators.**— Since the Pennsylvania Married Woman's Act of 1893, a married woman is not disqualified in that State from becoming a corporator in a proposed corporation.¹² The provisions of Pennsylvania Act April 9, 1879, removing from married women all disqualifications as corporators of associations for purposes of learning, benevolence, charity, or religion were not repealed by the Pennsylvania Married Women's Act of 1887; since the purpose of the latter act is to remove, not to add, restrictions upon their powers. Hence, where an application is made for a charter for a corporation "for the purpose of maintaining a society for benevolent or protective purposes to its members from funds collected therein," and it appears that all of the members are married women, the charter will be granted.¹³

§ 8164. **When Charters Refused to Aliens.**— Under a Pennsylvania statute requiring an application for a charter to allege that "three of them [the corporators] at least are citizens" of that Commonwealth, an application which makes no mention of the citizenship of the applicants, but whose names, together with other circumstances, create the presumption that they are aliens,— will be rejected.¹⁴ It has been ruled by one of the courts of Common Pleas of Pennsylvania, that foreigners, who cannot speak or write the English language, have no right to a charter of incorporation, White, P. J., saying: "Foreigners have no right to a charter.

¹¹ *Re Laxon & Co.*, [1892] 3 Ch. 555, per Vaughan Williams, J.; distinguishing *Re National Debenture &c. Corp.*, [1891] 2 Ch. 505.

¹² *Re Married Persons' Property Act*, 5 Pa. Dist. Rep. 742; s. c. 18 Pa. Co. Ct. 492; 3 Lack. L. News (Pa.) 2; per McCormick, Atty.-Gen.

¹³ *Re Bloomfield First Independent Ladies Aid Soc.*, 1 Pa. Dist. Rep. 754; s. c. 23 Pitts. L. J. (N. S.) 105.

¹⁴ *Re Charter of St. Ladislaus &c. Asso.*, 19 Pa. Co. Ct. 25.

Naturalized citizens may be members of a corporation, but a corporation should never be under the control of foreigners. When the State authorizes the charter of a corporation, the presumption is that its business will be conducted in the language of the State and according to the principles and usages of this country. That cannot be done if the members cannot speak or write the English language."¹⁵ It is perceived that this rule of exclusion would not apply to aliens of English-speaking countries. The same court, in another case, refused an application for a charter, because the name of the proposed corporation and the names of the proposed incorporators sufficiently showed that the proposed corporation would be composed of natives of a foreign country organized for the purpose of arming, drilling and discipline as a military company.¹⁶ In another case, moreover, a court of that State refused to approve a charter where the purpose of the incorporation was declared to be "the cultivation of German song, and the cultivation and improvement of German manners and customs."¹⁷

§ 8165. Organization of "One-Man" and "Two-Men" Companies.— The British House of Lords has established the doctrine that, under the English Companies Acts, a man engaged in manufacturing and trading may, for the purpose of creating a limited liability, turn his business into a limited liability company by organizing a company and issuing seven shares which he distributes, one to himself, one to his wife, one to his daughter and one to each of his four sons, and by the further device of turning his business and stock in trade over to the company in exchange for twenty-thousand of its shares which he issues to himself, and also for an additional mass of its debentures; so that, if the company thus formed soon thereafter fails and is wound up, its unsecured creditors have no remedy against him personally.¹⁸ Prior to the decision of the House of Lords and while the decision of the Court of Appeal, afterwards overruled, was in force, it was held in the Queen's Bench

¹⁵ Re Society Principessa Montenegro Savoya, 6 Pa. Dist. Rep. 486; s. c. 28 Pitts. L. J. (N. S.) 42.

¹⁶ Re Russian-American Guards' Charter, 3 Pa. Dist. Rep. 673; s. c. 13 Pa. Co. Ct. 148.

¹⁷ Re Germania Saengerbund 2 Pa. Dist. Rep. 73. For another case where a charter was refused to a society of

foreigners, though not on the express ground of the alienage of the incorporators,— see Re Lodge Duch Nove Doby, 3 Pa. Dist. Rep. 215.

¹⁸ Salomon v. Salomon, [1897] A. C. 22; s. c. 75 L. T. Rep. 426; Broderip v. Salomon, [1895] 2 Ch. 323; s. c. 72 L. T. Rep. 261.

Division that, where two persons, with the aid of the requisite number of dummies, have organized a limited liability company, and a debt has been contracted *with that company*, the creditor cannot be allowed to ignore the company and sue the two individuals as partners. The view was that the company, as a legal entity, was not before the court; that the plaintiffs were not proposing to indemnify its other creditors in case it should be wound up; and that it could not be got rid of in this way.¹⁹ These decisions, destructive of the rights of creditors and promotive of business dishonesty, ought not to be followed in this country.²⁰

§ 8165a. **Evading Constitutional Requirements as to Payment of Tax.**—Where the Constitution of the State imposes a specific tax upon the granting of certificates of incorporation for corporations of a certain class, and relieves from the payment of the tax corporations of another class,—such, for example, as those formed for benevolent, religious, scientific, or educational purposes,—the payment of the tax cannot be evaded by incorporating under a statute by which the legislature undertakes to classify a corporation formed for pecuniary objects, such as a building and loan association, under the description of benevolent societies. “Such legislative *leger-demain* is to be condemned, not approved.”²¹ Hence, a statute²² which provides for the incorporation of pleasure clubs without requiring them to pay the tax prescribed by the Constitution upon their capital stock, is void in so far as it undertakes to allow the creation of corporations other than those formed for benevolent, religious, scientific, or educational purposes.²³

§ 8166. **Charters Refused because Containing Unlawful Provisions.**—An application for a charter for an educational corporation was refused in Pennsylvania because it authorized “the acting faculty of instructors, together with a majority of the Board of Directors,” to *confer degrees*,²⁴—the reason being that the courts of Pennsylvania have no power to confer on an education corporation

¹⁹ Munkittrick v. Perryman, 74 L. T. Rep. (Q. B.) 149.

²⁰ See notes in the *American Law Review* on them: 31 Am. Law Rev. 309.

²¹ State v. McGrath, 95 Mo. 198.

²² Here, Revised Statutes of Missouri, 1889, § 2834.

²³ State v. Le Sueur, 99 Mo. 552; s. c. 7 L. R. A. 734.

²⁴ Re Duquesne Collégé Charter, 12 Pa. Co. Ct. 491; s. c. 2 Pa. Dist. Rep. 555.

the power to confer degrees.²⁵ A justice of the Supreme Court of New York may withhold his approval of the certificate of incorporation of a mutual benefit society where the corporation is a secular one, and the certificate provides that the business *meetings* shall be held *on Sunday*.²⁶

§ 8167. **Charter Prohibiting the Use of the English Language Refused.**— Under a Pennsylvania statute requiring the judges to “peruse and examine” every charter presented for the formation of a corporation, and if the same shall be in the proper form and within the purposes named in the statute, and shall appear lawful and not injurious to the community, to “endorse thereon those facts” and approve the charter,—a charter has been refused which contains the following recital: “Its [the society’s] official language is exclusively the Hungarian; the use of another language is not permitted even as an exception.” This clause was regarded by the court as “audacious.” “Surely,” said Barker, P. J., “the legislature did not intend the courts to grant the special privileges accorded to corporations to an association of individuals so little in sympathy with our institutions as to prohibit the use of the English language in the transaction of its official business and the deliberations of its members.”²⁷ Similarly, the court of Common Pleas of Philadelphia refuses to grant an amendment to the charter of a religious corporation which requires all its services, teachings, and business to be conducted in the German language,—such amendments being against public policy.²⁸

§ 8168. **Defects in Applications or Articles for which Charters for Ideal Purposes Refused.**— In Pennsylvania, the courts do not approve charters which are sought for ideal purposes, and the Executive Department, in granting charters for business purposes, have adhered with considerable uniformity to the principle that an application for a charter ought to set forth the purposes for which the incorporation is sought, in distinct and definite terms, otherwise it will be refused.²⁹ Thus, gas companies can be incorporated in

²⁵ So held in *Re Medical College*, 3 Whart. (Pa.) 445.

²⁶ *Re Agudath Hakehiloth*, 18 Misc. (N. Y.) 717; s. c. 55 Alb. L. J. 24; 42 N. Y. Supp. 985; 29 Chicago Leg. News, 158.

²⁷ *Re Charter of St. Ladislaus &c. Asso.*, 19 Pa. Co. Ct. 25.

²⁸ *Re German Evangelical &c. Church*, 20 Pa. Co. Ct. 472; s. c. 6 Pa. Dist. Rep. 412.

²⁹ *Re Newton Hamilton Oil &c. Co.*, 10 Pa. Co. Ct. 452; *Re Pennsylvania State Sportsmen’s Asso.*, 11 Pa. Co. Ct. 576.

Pennsylvania only for the "manufacture and supply" of gas; and therefore the application for such a charter must affirmatively show that the company proposes to make its own gas.³⁰ In that State where the application is made to the court under the Act of 1874, the court is required to certify that the purpose is lawful and not injurious to the community. In order that the court may do this, the application must do more than describe the purposes in general terms. It must show both the purpose of the proposed corporation and the plan or mode by which that purpose is to be carried into effect. A mere statement that it is for "beneficial or protective purposes," is insufficient.³¹ It must, in addition to setting forth the purpose in the words of the statute, show how that purpose is to be carried out, and that there is some necessity for the incorporation.³² Charters or certificates of incorporation have been refused for the following defects in the application:— Stating the number of subscribers to be *fifteen*, whereas only *ten* names are actually subscribed;³³ stating the purposes of the incorporation to be "social enjoyment," these words being too comprehensive;³⁴ stating one of the purposes of the intended corporation to be that of "supporting the interests of said township by a care of its sanitary conditions of public comfort";³⁵ stating the purpose of the proposed incorporation to be the promotion of music and "social enjoyment," without setting forth the character of that enjoyment.³⁶ In short, the term "social enjoyment," used to describe the purpose of a proposed corporation in that State, is too indefinite. The articles should set out with particularity the character and nature of the social enjoyments proposed to be provided, and how they are to be conducted, so that the court may, without hesitation, certify that the purposes are lawful and not injurious to the public.³ A charter was refused which did not mention the proper division of the Act of Assembly under which it was sought; but the court permitted it to

³⁰ Re Charters of Gas Companies, (Exec. Depart.) 18 Pa. Co. Ct. 136; s. c. 5 Pa. Dist. Rep. 396.

³¹ Re McKee's Rocks Volunteer Fireman's Relief Asso., 6 Pa. Dist. Rep. 477; s. c. 28 Pitts. L. J. (N. S.) 38; 19 Pa. Co. Ct. 537.

³² Re Ton-a-lu-ka Club, 1 Pa. Dist. Rep. 460.

³³ Re Charter for Nether Providence Asso., 12 Pa. Co. Ct. 666; s. c. 2 Pa. Dist. Rep. 702.

³⁴ Re Charter for Nether Providence Asso., *supra*.

³⁵ Re Charter for Nether Providence Asso., *supra*.

³⁶ Re Burger's Military Band Asso., 19 Pa. Co. Ct. 651; s. c. 14 Lanc. L. Rev. (Pa.) 379.

³⁷ Re Monroe Republican Club, 6 Pa. Dist. Rep. 515; s. c. 19 Pa. Co. Ct. 568; 28 Pitts. L. J. (N. S.) 52; Re Jacksonian Club, 11 Pa. Co. Ct. 19.

be *amended* and then granted it.³⁸ So, a charter was refused where the application stated that the purpose was the maintenance of a society for beneficial and protective purposes to its members, from funds collected therein, in cases of sickness or death, as well as mutual assistance in all relations of life; but did not state the particular manner in which it was proposed to be beneficial or the particular kind of protection intended to be afforded, and provided no method by which members other than those named could be received, and did not prescribe their qualifications.³⁹ It has been held in that State that, in forming a corporation for ideal purposes of the *second* class, the seven statements required by the statute are sufficient, and, if read into the charter, would form a complete constitution; but with respect to a corporation of the *first* class, it is different. These have nothing in common with each other except that they are not organized for pecuniary profit. Consequently, the rights of the incorporators as between themselves must be defined in the charter. An application for a charter for a corporation of the first class was therefore refused, where nothing was stated as to whether there was any capital stock, as to how members should be admitted or the succession of the incorporators maintained, or how and by what body by-laws for the management of its property and the regulation of its affairs might be instituted, or as to how the charter might be amended.⁴⁰ A charter for a beneficial association was refused where the application did not set forth that any of the incorporators were citizens of the United States, and failed to give the names of directors for the first year.⁴¹ In the same State, it has been held that an application for a charter defining the purposes of the proposed corporation as "the founding of a permanent social club for the intercourse and enjoyment of its members, and such kindred purposes as the club may from time to time determine," is too vague, as it should state particularly the character of the intended enjoyments and how they are to be conducted, so

³⁸ Re Pennsylvania State Sports-men's Asso., 11 Pa. Co. Ct., 576.

³⁹ Re Skandinaviska, 3 Pa. Dist. Rep. 235. Contrary to this, another court in that State has held that the declaration of the purposes of a proposed fraternal benefit relief society, in an application for a charter, in the formal language of Pa. Act April 6, 1893, is sufficiently explicit although

it does not state specifically how membership is to be obtained, continued, or lost, or submit the whole constitution. Re Continental Mut. Ben. Soc., 7 Pa. Dist. Rep. 167; s. c. 42 W. N. C. (Pa.) 183.

⁴⁰ Re Permanent Relief Asso., 3 Pa. Dist. Rep. 236.

⁴¹ Re Charter of Saint Ladislaus &c. Asso., 19 Pa. Co. Ct. 25.

that it may be determined that the purposes are lawful and not injurious to the community.⁴²

§ 8169. Defects in Applications for Charters for Business Corporations.— In considering whether a charter ought to be granted or refused, the Executive Department of Pennsylvania look only to the application itself, and do not refuse a charter for reasons not apparent on the face of it.⁴³ It will not, on such an application, determine disputed questions of fact, but will leave such questions to be determined by the courts.⁴⁴ Thus, where a water supply company applies for a charter, under the Act of April 29, 1874, covering the identical territory embraced in a previous exclusive charter to a like company, the charter will be refused, although there be testimony that the first company has failed to supply the public with water, and has never attempted to acquire the necessary supplies for that purpose.⁴⁵ It manifestly follows from this that the application must show on its face a clear right to the charter; and in order that it may appear whether or not it will conflict with a charter previously granted to another company, if it be a water supply company, a gas company or the like, the district which it is proposed to supply must be specifically defined in the application.⁴⁶ Thus, an application for the charter of a *water company* which shows only that the company desires to take water from a

⁴² Re Americus Club, 6 Pa. Dist. Rep. 760; s. c. 20 Pa. Co. Ct. 237. Applications have been refused in the same State for the following reasons:— An application for a charter for a stock exchange, for failing to set out its constitution, its laws relating to membership and its mode of raising money: Re Pittsburgh Stock Exch., 26 Pitts. L. J. (N. S.) 308. An application to charter an accountant's association, because it contained no indication as to who could become members, or on what terms and conditions as to age, sex or otherwise: Re Accountants' Asso. of Pittsburgh, 5 Pa. Dist. Rep. 699; s. c. 18 Pa. Co. Ct. 159; 27 Pitts. L. J. (N. S.) 103. An application for a charter, stating the purposes of the corporation as "to promote intercourse and friendship among accountants, to raise the standard of office work in all its branches, and to obtain employment for and otherwise assist deserving members,"—

was held too indefinite as to the purpose and as to the manner in which it shall be carried out: Re Accountants' Asso. of Pittsburgh, 5 Pa. Dist. Rep. 699; s. c. 18 Pa. Co. Ct. 159; 27 Pitts. L. J. (N. S.) 103.

⁴³ Re Seneca Bridge &c. Co., (Pa. Exec. Dept.) 11 Pa. Co. Ct. 337; s. c. 1 Pa. Dist. Rep. 416; 30 W. N. C. (Pa.) 200.

⁴⁴ Re Seneca Bridge &c. Co., (Pa. Exec. Dept.) 11 Pa. Co. Ct. 337; s. c. 1 Pa. Dist. Rep. 416; 30 W. N. C. (Pa.) 200; Union Water Co. v. Edgeworth Water Co., (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 536; s. c. 30 W. N. C. (Pa.) 371.

⁴⁵ Union Water Co. v. Edgeworth Water Co., (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 536; s. c. 30 W. N. C. (Pa.) 371.

⁴⁶ Re New Gas Light Co., (Pa. Exec. Dept.) 7 Pa. Dist. Rep. 151; s. c. 1 Dauph. Co. Rep. 22.

certain stream between specified townships, without stating where the company is located, or into what town, borough, city, or district it proposes to introduce water, was refused.⁴⁷ As more fully shown in another section,⁴⁸ the system in vogue in that State requires the application for a charter for a *business* corporation to set forth a *single* purpose, though one Attorney-General ruled that *two* purposes might be blended in one charter, if they were kindred and cognate.⁴⁹ Accordingly, an application expressing the purpose of the intended incorporation to be "for the mining for and manufacturing of oil and gas" was held too general and indefinite to be granted; since it might be held to combine the provisions of different statutes regulating the formation of corporations.⁵⁰

§ 8170. **Chartering Corporations with Franchises that Conflict with Exclusive Franchises already Granted to Others.**—The grant of an exclusive franchise — assuming it to be valid under the Constitution of the State — is protected from impairment by a subsequent grant of the same franchise to others, by the contract clause of the Constitution of the United States as construed in the Dartmouth College case;⁵¹ though a grant will not be construed as being exclusive unless the intent of the State to make it so clearly appears.⁵² Thus, an exclusive franchise granted to a corporation to furnish *manufactured* gas for light and heat to the citizens of a town is not infringed by a subsequent statute authorizing the creation of corporations for the distribution of *natural* gas, and by the

⁴⁷ Re Perkiomen Water Storage &c. Co., 32 W. N. O. (Pa.) 280; s. c. 2 Pa. Dist. Rep. 466.

⁴⁸ *Ante*, § 8156.

⁴⁹ Re Newton Hamilton Oil &c. Co., 10 Pa. Co. Ct. 452.

⁵⁰ Re Newton Hamilton Oil &c. Co., 10 Pa. Co. Ct. 452. The provisions of Neb. Comp. Stat. chap. 16, that the certificate of organization of a railroad company shall state the names of the *termini* and the county or counties through which the road will pass, applies only to the *main* line, and not to *branch* lines within the State: Trester v. Missouri &c. R. Co., 33 Neb. 171; s. c. 49 N. W. Rep. 1110; 10 Ry. & Corp. L. J. 447. Articles of incorporation providing that the total indebtedness of the corporation shall at no time exceed \$300 except by a majority vote

of the stockholders are in substantial compliance with Iowa Code, § 1061, providing that "such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any time to be subject," and are valid notwithstanding the articles also provide that a change therein can only be made by a two-thirds' vote: Thornton v. Balcom, 95 Iowa, 198; s. c. 52 N. W. Rep. 190.

⁵¹ 4 Wheat. (U. S.) 518.

⁵² Warren Gas Light Co. v. Pennsylvania Gas. Co., 161 Pa. St. 510; s. c. 29 Atl. Rep. 101; aff'g s. c. 13 Pa. Co. Ct. 310; Charles River Bridge v. Warren Bridge, 11 Peters (U. S.) 420; Detroit v. Detroit City R. Co., 56 Fed. Rep. 867.

incorporation thereunder of a company with power to use the streets of the same town for laying its pipes and distributing its product.⁵³ So, also, if the State has already granted an exclusive franchise to one corporation and if the grant is valid, a grant of the same franchise to another corporation is merely void. It follows that the officer charged with making the grants of corporate charters ought to refuse to sanction a charter which contains a grant of an exclusive franchise already granted to another corporation. The Executive Department of the State of Pennsylvania acts upon this principle and refuses grants, where it appears from the application and from matter of record in the department, that the proposed charter contains a grant of an exclusive franchise previously granted to another corporation, which previous grant has not expired.⁵⁴ In such a case the Executive Department will not try the question whether the new grant which is sought will

⁵³ Warren Gas Light Co. v. Pennsylvania Gas Co., 161 Pa. St. 510; s. c. 29 Atl. Rep. 101; aff'g s. c. 13 Pa. Co. Ct. 310. So, it has been ruled, on an application for a charter, that a corporation chartered by special statute to supply gas for *lighting* cannot acquire an exclusive right to furnish gas for *heating*, so as to exclude a corporation organized for that purpose, by accepting the provisions of Pa. Act 1874, providing that corporations formed under it for the manufacture and supply of gas or the supply of light or heat shall have an exclusive privilege, and that corporations organized under special statutes may, by accepting its provisions, have a like privilege: Keystone Fuel Gas Co. v. Williamsport Gas Co., (Pa. Exec. Dept.) 2 Pa. Dist. Rep. 85; s. c. 12 Pa. Co. Ct. 302; 31 W. N. C. (Pa.) 231.

⁵⁴ Union Water Co. v. Edgeworth Water Co., (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 536; s. c. 30 W. N. C. 371; Re Landsdowne Gas Co., (Pa. Exec. Dept.) 3 Pa. Dist. Rep. 492; s. c. 14 Pa. Co. Ct. 518. Thus, a new water company will not be chartered for a district in which another company has been chartered under the Pennsylvania Act of April 29, 1874, providing that the privilege shall be exclusive and no other company shall be incorporated within the district until the corporation shall during five

years have earned and divided 8 percent. per annum upon its capital stock, although it is alleged that the prior corporation has failed to supply the inhabitants of the district: Union Water Co. v. Edgeworth Water Co., (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 536; s. c. 30 W. N. C. (Pa.) 371. So, an application by a corporation for a charter made pending an application, by an existing corporation entitled to exclusive privileges, for an extension of the time allowed by law for the completion of its works, will be denied until the question whether the latter has forfeited its rights is determined in the pending proceeding for extension: Re Bryn Mawr Water Co., (Pa. Exec. Dept.) 29 W. N. C. (Pa.) 156; s. c. 1 Pa. Dist. Rep. 89; 10 Pa. Co. Ct. 670. So in Pennsylvania a charter will not issue to a water company to cover territory occupied by another company under an exclusive charter, where, pending the application therefor, the franchises of the latter company have been *extended* by a decree of the court of Common Pleas: Re Levis Water Co., (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 146; s. c. 29 W. N. C. (Pa.) 409; 11 Pa. Co. Ct. 178. The acceptance by a gas company chartered in 1871, of the provisions of Pa. Act April 29, 1874, providing that such acceptance shall entitle the company to all the privileges under the

conflict with a previous one, because that would involve it in a trial of disputed questions of fact for which it has not the machinery, but will leave that to the courts. It will not, therefore, try the question whether the old corporation has forfeited its franchise by failing to discharge the public duties which it undertook.⁵⁵ Evidently, in such a case the parties seeking the new franchise should first proceed to have the one granted to the old corporation vacated for non-user or mis-user.⁵⁶ On the other hand, to warrant the Executive Department of that State in refusing a charter on this ground, the conflict must be clear;⁵⁷ and it seems that that department will not try a case involving disputed questions of fact for the purpose of determining whether or not such a conflict will arise. It will not, for example, except in a clear case, undertake to decide that an incorporated water supply company has an exclusive franchise in territory alleged to be adjacent; but, on the application for a charter by a rival company, will grant the charter and leave the question to be decided by the courts.⁵⁸ So, where an inclined plane company prays for incorporation, with power to erect an inclined plane over a certain route, which it is claimed will interfere with the route of a similar company previously incorporated, the department will grant the charter and leave the construction of the railway to the local authorities.⁵⁹ So, a charter will not be re-

act as if originally incorporated thereunder, entitles the company to the exclusive franchise given by par. 34, cl. 3, as amended, and prevents the chartering of another corporation to exercise the same franchise in the same territory, although the acceptance is filed after the application for the charter of the latter company: *Re Suburban Gas Co. No. 1*, (Pa. Exec. Dept.) 3 Pa. Dist. Rep. 491; s. c. 14 Pa. Co. Ct. 519.

⁵⁵ *Union Water Co. v. Edgeworth Water Co.*, (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 536; s. c. 30 W. N. C. (Pa.) 371.

⁵⁶ Thus, a new company cannot be properly organized to take property away from a *cemetery company* properly organized under a special statute which it has accepted, and which has taken possession of the property after conveyance to it, although it is improperly managing the trust, and improper persons have been admitted to

its meetings, and its directors have been illegally and improperly chosen, and the management taken away from those entitled to it: *Prospect Hill Cemetery v. German Evangelical Soc.*, (D. C. App.) 22 Wash. L. Rep. 122.

⁵⁷ A charter will be granted to a gas company notwithstanding a claim by another company to the exclusive right to certain territory, where there is a reasonable doubt as to the authority of the latter company to occupy such territory: *Suburban Gas Co. v. Lansdowne-Yeadon Gas Co.*, (Pa. Exec. Dept.) 3 Pa. Dist. Rep. 597; s. c. 15 Pa. Co. Ct. 126.

⁵⁸ *Granite Water Co. v. Girard Water Co.*, (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 534; s. c. 30 W. N. C. (Pa.) 417.

⁵⁹ *Re Park Incline Plane Co.*, (Pa. Exec. Dept.) 1 Pa. Dist. Rep. 535; s. c. 30 W. N. C. (Pa.) 256; 11 Pa. Co. Ct. 486.

fused to a bridge company by the Pennsylvania Executive Department, on the ground that it is proposed to take property of a railroad company necessary for the convenient conduct of its business or its best interests; since the department has no jurisdiction to decide the question, and the charter will confer no improper rights.⁶⁰

§ 8171. **Signing and Acknowledging the Articles.**—It is not essential that the incorporators shall each be able to *sign his name*, under a statute requiring the incorporators to “prepare and sign” an act, either in an authentic or private form.⁶¹ A statute of California,⁶² provides that articles of incorporation must be subscribed by *five* or more persons and acknowledged by *each*. It was held that a corporation is not rightfully such, and may be deprived of its charter, where, although five incorporators signed the articles, they were acknowledged by only four.⁶³

§ 8172. **Clerical Form of the Application: How Written and Put Together.**—In Pennsylvania an application for a charter is objectionable when it is typewritten upon several sheets of paper joined together with eyelets, instead of being written upon one single sheet.⁶⁴ And so where the sheets were tied together with tape.⁶⁵ In the same State, an application for incorporation written on ten half sheets of paper tacked together, the first six pages containing “the articles of association and by-laws,” followed by a repetition of the articles with others added, but without the by-laws, the latter part being sworn to and acknowledged, but the former not, and the latter part bearing the printed certificate for the judge to sign,—has been rejected, as most objectionable and improper in form.⁶⁶ So, a charter was refused because the application was full of erasures and interlineations.⁶⁷

§ 8173. **Amending Applications for Charters.**—If the governing statute provides a method for amending the application for a char-

⁶⁰ Re Seneca Bridge Co., (Pa. Exec. Dept.) 11 Pa. Co. Ct. 337; s. c. 1 Pa. Dist. Rep. 416; 30 W. N. C. (Pa.) 200.

⁶¹ Seventh Street Colored M. E. Church v. Campbell, 48 La. An. 1543; s. c. 21 South. Rep. 184.

⁶² Cal. Civ. Code, § 292.

⁶³ People v. Montecito Water Co., 97 Cal. 276; s. c. 32 Pac. Rep. 236.

⁶⁴ Re Monroe Republican Club, 6 Pa.

Dist. Rep. 515; s. c. 28 Pitts. L. J. (N. S.) 52; 19 Pa. Co. Ct. 568.

⁶⁵ Re Accountants' Asso. of Pittsburgh, 5 Pa. Dist. Rep. 699; s. c. 18 Pa. Co. Ct. 159; 27 Pitts. L. J. (N. S.) 103.

⁶⁶ Re Society Principessa Montenegro Savoya, 6 Pa. Dist. Rep. 486; s. c. 28 Pitts. L. J. (N. S.) 42.

⁶⁷ Re Zion Church Charter, 5 Pa. Dist. Rep. 780.

ter or a certificate of incorporation, that method must be followed; but it has been held that, if the statute is silent upon the subject, the amended articles must be drawn up, signed, acknowledged, and filed as required by the statute in the case of original articles.⁶⁸ Another court reasoned that if the governing statute does not provide for the amendment of the certificate of incorporation, articles of association, or other instrument of incorporation, any attempted amendment must have the substantial effect of a re-incorporation, so that the existence of the corporation will date from the amendment, and will not date by relation from the filing of the original and abortive instrument.⁶⁹ Quoting the above decisions, Mr. Secretary of State Reeder, of Pennsylvania, said: "The reasoning of these decisions is, that if the defects are radical or material, the original instrument is wholly inoperative and void, and affords no basis for the amendment without the aid of an enabling statute;" and, there being no such statute in that State, he refused leave to certain applicants for a charter, to amend their application by filing it under a new name, where he had rejected it on the ground that the name assumed in it conflicted with the name of a corporation already existing in the same place; but ruled that they must begin over again and proceed in conformity with the statute, just as though no application had been made and rejected.⁷⁰ In like manner, after a company has become incorporated in Pennsylvania, it cannot have its certificate of incorporation amended so as to change its original purpose,—as, for instance, where it has been incorporated to manufacture preserves, syrups, etc., so as to enable it to engage in the wholesale selling of intoxicating liquors.⁷¹ An incorporated chamber of commerce, created in Michigan under one statute,⁷² may amend its articles so as to increase its capital stock, under the provisions of a statute⁷³ applicable to all corporations, where the statute law has made no special provision applicable to the case.⁷⁴ In Pennsylvania, according to departmental rulings, a radical amendment to an *application for a charter* will not be permitted, but the applicants

⁶⁸ Day v. Mill Owners &c. Ins. Co., 75 Iowa, 694.

⁶⁹ Re New York Cable R. Co., 109 N. Y. 32.

⁷⁰ Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. 662. Compare Re Waverly Ladies of Red Cross, 1 Pa. Dist. Rep. 605, where a court

in Pennsylvania allowed just such an amendment.

⁷¹ Pennsylvania Bottling &c. Co., 6 Pa. Dist. Rep. 530; s. c. 19 Pa. Co. Ct. 593.

⁷² How. Mich. Ann. Stat., ch. 108.

⁷³ Ibid., § 4866.

⁷⁴ Detroit Chamber of Commerce v.

must begin over again. Such an application cannot be amended by altering the title and readvertising, so that the proceedings will relate to the date of the filing of the original application and retain all rights of priority;⁷⁵ but an amendment of an application must be treated as a new application, and must conform to all the requirements of an original proceeding.⁷⁶ For example, an application for a charter to the "Altoona Gas Company" cannot be amended to make the name "The Consumers' Gas Company of Altoona."⁷⁷

§ 8174. **Rehearing after Charter Refused.**—In Pennsylvania, after a charter has been refused by the Secretary of State, by reason of its similarity of name to an existing corporation, a rehearing will not be granted by the Governor, but the applicants will be left to their remedy, if any, in the courts.⁷⁸

Secretary of State, 109 Mich. 691; s. c. 3 Det. L. N. 252; 4 Am. & Eng. Corp. Cas. (N. S.) 560; 67 N. W. Rep. 897.

⁷⁵ Re Amendment of Applications for Charter, (Pa. Exec. Dept.) 5 Pa. Dist. Rep. 299.

⁷⁶ Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. 662. *Contra*, that an application for a charter of a gas company may be amended after its

refusal, by leaving out territory claimed as exclusive by a rival corporation: Suburban Gas Co. v. Lansdowne-Yeadon Gas Co., (Pa. Exec. Dept.) 3 Pa. Dist. Rep. 597; s. c. 15 Pa. Co. Ct. 126.

⁷⁷ Altoona Gas. Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. 662.

⁷⁸ Re Bradley Fertilizer Co., 6 Pa. Dist. Rep. 423; s. c. 19 Pa. Co. Ct. 271.

CHAPTER CCIV.

AMENDMENT OF CHARTERS.

SECTION

8177. Amendments to charters.

8178. Amendments violating constitutional rights.

8179. Other amendments which cannot be made.

SECTION

8180. Amendments of the articles of association, deeds of settlement, &c.

8181. Registration of the amendment.

§ 8177. **Amendments to Charters.**—As in the case of an original charter, so an amendment to a charter, in order to be valid, must be accepted by the stockholders.¹ Amendments to charters or acts of incorporation attempting to confer upon corporations powers which they cannot constitutionally exercise are of course void,—as an amendment attempting to confer upon rural cemetery associations the power to condemn land.²

§ 8178. **Amendments Violating Constitutional Rights.**—Amendments of this nature are invalid unless accepted or assented to by

11 Thomp. Corp., § 67. Thus, an act of the legislature making the validity of a lease by a railroad company, whose charter vests the power of making such a lease in the stockholders, dependent upon the acceptance by the board of directors of an amendment of the charter transferring the power from the stockholders, must, in order to be valid, be accepted by the stockholders: *Re Opinion of the Judges*, 120 N. C. 623; s. c. 28 S. E. Rep. 18. A constitutional restriction against the creation of private corporations by special laws and other special legislation, has been held not to prevent the amendment by special act of a special charter previously enacted. *St. Joseph &c. R. Co. v. Shambaugh*, 106 Mo. 557; s. c. 11 Ry. & Corp. L. J. 75; 17 S. W. Rep. 581.

² *Board of Health v. Van Hoesen*, 87 Mich. 533; s. c. 14 L. R. A. 114;

49 N. W. Rep. 894; 35 Am. & Eng. Corp. Cas. 209. The power vested in the court of Common Pleas of Pennsylvania to change the name, style, and title of any corporation, was devested by Pa Act June 13, 1883, conferring upon the executive department of the government the power to approve, amend, or alter the articles and conditions of any charter: *Ft. Pitt Bldg. &c. Asso. v. Model Plan Bldg. &c. Asso.*, 159 Pa. St. 308; s. c. 33 W. N. C. (Pa.) 457; 24 Pitts. L. J. (N. S.) 295; 28 Atl. Rep. 215. That an amendment to a railway charter authorizing the company to increase its corporate stock to an amount sufficient to represent the full cost of its road, and to liquidate any of its debts by the issue of preferred stock, does not impliedly repeal a former charter provision that stock paid for with interest-bearing municipal bonds shall

the stockholders in some form.³ But the acceptance need not be evidenced by any formal corporate action. For example, an amendment of a college charter changing the number of its trustees, is validated by the annual election by the private stockholders, for several years thereafter, of the number of trustees designated in the amendment.⁴ Under this principle, the charter of an incorporated "trust" composed of several corporations, cannot, in New Jersey, be amended by the legislature so as to provide for *cumulative voting* for directors unless with the consent of *two-thirds* of the stock, as provided in the *by-laws*, notwithstanding a statute allowing the original certificate to be amended by the assent of a *majority* in interest of the stockholders.⁵ In Illinois a statute relating to particular classes of corporations employing labor, but not relating to corporations organized for pecuniary profit, requiring them to pay their laborers weekly, under a penalty, has been held void, as depriving the corporations thereby affected, of liberty and property without due process of law.⁶

§ 8179. **Other Amendments which Cannot be Made.**—Under the statute law of Ohio as existing in 1896, articles of incorporation could not be amended so as to change substantially the original purpose of the organization,—as, for example, to change a *gas and electric lighting* company into a *street railway* company.⁷ The rule is the same in Pennsylvania. In that State, according to a ruling of the Attorney-General, a corporation originally organized to manufacture preserves, syrups and the like, cannot have its charter amended to authorize it to engage in the sale of *liquor*.⁸

§ 8180. **Amendments of the Articles of Association, Deeds of Settlement, &c.**—Amendments by the *voluntary action* of the

bear interest payable in stock until a cash dividend is declared, so as to authorize the stopping of interest by declaring a mere stock dividend: *Hardin County v. Louisville &c. R. Co.*, 92 Ky. 412; s. c. 17 S. W. Rep. 860.

³ *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440; s. c. 28 Atl. Rep. 454.

⁴ *Jackson v. Walsh*, 75 Md. 304; s. c. 23 Atl. Rep. 778.

⁵ *Loewenthal v. Rubber Reclaiming Co.*, *supra*.

⁶ *Braceville Coal Co. v. People*, 147 Ill. 66; s. c. 22 L. R. A. 340; 48 Alb. L. J. (N. Y.) 390; 44 Am. & Eng. Corp. Cas. 1; 35 N. E. Rep. 62.

⁷ *State v. Taylor*, 55 Ohio St. 61; s. c. 35 Ohio L. J. 384; 4 Am. & Eng. Corp. Cas. (N. S.) 470; 28 Chicago Leg. News, 362; 44 N. E. Rep. 513.

⁸ *Re Pennsylvania Bottling, &c. Co.*, (Atty.-Gen.) 6 Pa. Dist. Rep. 530; s. c. 19 Pa. Co. Ct. 593.

shareholders, of the articles of association, stand on much the same footing. Unless the governing statute or the original articles provide otherwise, such amendments, if they materially alter the scheme or object for which the corporation was organized, require *unanimous consent*. But this consent may be shown by negative acquiescence as well as by formal action.⁹ Statutes exist which allow the articles of association to be amended by the votes of the majority of the shareholders. Such a statute in Minnesota allows articles of incorporation to be so amended "in any respect which might have been lawfully made a part of such original articles."¹⁰ Under this statute, a corporation whose articles of association authorize it, among other things, to guarantee the credit of business men, may amend them so as to authorize it to make commercial reports to be furnished for compensation to applicants. In England, a corporation cannot disable itself by contract from amending its articles of association.¹¹ In Pennsylvania, the so-called "charter" of a medical college may be amended so as to empower it to confer degrees in dental surgery and pharmacy.¹²

§ 8181. Registration of the Amendment.—If the governing statute requires a charter to be registered in a certain public office, it may fairly be assumed that an amendment to such charter must, to be valid, be so registered.¹³ For the purpose of determining a question relating to the taxation of corporate property under a statute requiring it to be listed and valued as of a certain date, an amendment to the charter of a corporation takes effect, not from the date when the amendment was applied for, but from the date at which it was filed for record with the Secretary of State.¹⁴

⁹ *State v. Montgomery Light Co.*, 102 Ala. 594; s. c. 15 South. Rep. 347.

¹⁰ Minn. Gen. St. 1878, ch. 34, tit. 2, § 118; with which read *Id.*, tit. 1, § 4, and tit. 2, § 110.

¹¹ *Malleson v. National Ins. &c. Corp.*, (1894) 1 Ch. 200. Amendments of articles of association, memoranda of association, deeds of settlement, etc., have been held valid in England, under various statutes, in *Malleson v. National Ins. &c. Corp.*, (1894) 1 Ch. 200; in *Re Reversionary Interest Soc.*, (1892) 1 Ch. 615 (adding borrowing powers to a society organized to purchase reversionary interests); *Re Al-*

liance Marine Assur. Co., (1892) 1 Ch. 300 (adding to a marine insurance company the power to do a life, fire, and accident insurance business, but only on condition of so altering its name as to indicate its assumption of the increased powers); *Re National Boiler Ins. Co.*, (1892) 1 Ch. 306; *Re Governments Stock Invest. Co.*, No. 2, (1892) 1 Ch. 597.

¹² *Re Medical-Chirurgical College's Petition*, 7 Pa. Dist. Rep. 329.

¹³ *Anderson v. Middle &c. R. Co.*, 91 Tenn. 44; s. c. 17 S. W. Rep. 803.

¹⁴ *Distilling &c. Co. v. People*, 161 Ill. 101; s. c. 43 N. E. Rep. 779.

CHAPTER CCV.

NAMES OF CORPORATIONS.

SECTION	SECTION
8183. Charters refused for reasons relating to name.	8192. Corporation protected in equity in the use of its corporate name.
8184. Instances where the similarity of names was not close enough for exclusion.	8193. Corporation not protected in use of name of previous corporation or voluntary association.
8185. Instances where charters were refused by reason of similarity of names to those of existing corporations.	8194. When a man may be restrained from using his own name in the name of a corporation.
8186. Chartering a corporation of the same name in another State.	8195. What if infringing body is engaged in an unlawful undertaking.
8187. Changing corporate name so as to infringe name of existing corporation.	8196. Laches in making application bars relief.
8188. Effect of license to a corporation to use a name which an existing corporation has resolved to adopt.	8197. Circumstances of acquiescence and estoppel precluding this relief.
8189. Contract entered into with a corporation under an assumed name.	8198. Questions of procedure in such cases.
8190. Liability of a corporation which permits another to carry on business in its name.	8199. Form of relief.
8191. Presumption where two corporations having a common name execute the same instrument.	8200. Doctrine that equity will not interfere in such cases.
	8201. Distinction in this respect between corporations created by special charters and those formed under general laws.
	8202. Names descriptive of places or employments not enjoined.

§ 8183. **Charters Refused for Reasons Relating to Name.**—In Pennsylvania, where charters to business corporations are granted by the Executive Department of the State government, the practice exists — and it is to be commended — of hearing the protests of interested parties against the granting of a charter in any particular case. Where a charter is applied for under a particular name, an existing corporation having a similar name may oppose the application; and it has been ruled that a *foreign corporation* doing business

in Pennsylvania has the same right of protest.¹ In that State, a charter for a corporation will be refused where the name set forth in the application differs materially from the name set forth in the notice required by the statute to be published,—as where the name in the application is St. Ladislaus &c. Association, and the name in the publication is St. Laszlo &c. Association.² So, a court in Pennsylvania refused to approve a charter for a corporation to be named “The Association of Nether Providence.” Said Clayton, P. J.: “There may be many associations in Nether Providence, and there is nothing in this name to distinguish it from any other, unless we are to put the stress of the voice on the definite article and call it THE Association of Nether Providence.”³ The executive department of that State has ruled that the name “Bradley Fertilizer Company of Philadelphia” is so similar to the name “Bradley Fertilizer Company” of a Massachusetts corporation doing business in Pennsylvania and there taxed the same as domestic corporation, that the application for the former for a charter must be refused.⁴

§ 8184. Instances where the Similarity of Names was not Close Enough for Exclusion.—The Bank of Attica was allowed to change its name to the “Buffalo Commercial Bank,” notwithstanding the opposition of “The Bank of Commerce in Buffalo.”⁵ The name “International Loan & Trust Company of Kansas City” was held not to resemble the name “International Trust Company,” a domestic corporation, closely enough to entitle the domestic corporation to an injunction restraining the latter from doing *any* business in Massachusetts; though, under a peculiar statute of that State, it was enjoined from doing the *same* business in Massachusetts as that of the domestic corporation.⁶ The Executive Department of the Commonwealth of Pennsylvania, whose rulings on these questions are certainly entitled to respect, proceeding on the narrow ground of merely preventing confusion in the collection of taxes and in judi-

¹ Re Bradley Fertilizer Co., 6 Pa. Dist. Rep. 423; s. c. 19 Pa. Co. Ct. 271.

² Re Charter of St. Ladislaus &c. Asso., 19 Pa. Co. Ct. 25.

³ Re Charter for Nether Providence Asso., 12 Pa. Co. Ct. 666; s. c. 2 Pa. Dist. Rep. 702.

⁴ Re Bradley Fertilizer Co., (Exec. Dept.) 6 Pa. Dist. Rep. 423; s. c. 19 Pa. Co. Ct. 271. Rehearing not

granted because of similarity of name but remedy in the courts: Re Bradley Fertilizer Co., (Atty.-Gen.) 6 Pa. Dist. Rep. 423; s. c. 19 Pa. Co. Ct. 477.

⁵ Matter of Bank of Attica, 35 N. Y. St. Rep. 708; s. c. 12 N. Y. Supp. 648; 59 Hun (N. Y.) 615, mem.

⁶ International Trust Co. v. International Loan & Trust Co., 153 Mass. 271; s. c. 10 L. R. A. 758; 26 N. E. Rep. 693; 9 Rail. & Corp. L. J. 510.

cial process,⁷ have granted a charter to the "Kidd Bros. & Burgher Steel Wire Company," against the protest of the "Kidd Steel Wire Company, Limited,"⁸ to the "North Fifth Street Mutual Land Association," against a protest of the "North Fifth Street Real Estate Company,"⁹ to the "Dime Savings Bank of Philadelphia," against the protest of the "Dime Savings Fund & Trust Company,"¹⁰ to the "Carlin Manufacturing Company," against the protest of the copartnership known as "Thomas Carlin's Sons,"¹¹ to the "York Wall Paper Company," against the protest of the "York Card & Paper Company,"¹² to the "Columbus Security Order," against the protest of the "Universal Order of Security."¹³ In the same State a corporation chartered under the name of the "Citizens' Trust, Tax Indemnity & Surety Company", was permitted to amend its name by striking out the words "Tax Indemnity;" notwithstanding the protest of the "City Trust, Safe Deposit & Surety Company," of the same city.¹⁴ In the same State, where the name "Duquesne College," though once conferred on an educational institution, had not been used for many years, and the institution itself had been absorbed by another college of a different name, a charter of incorporation was granted to a new institution under the name of "Duquesne College."¹⁵

§ 8185. Instances where Charters were Refused by Reason of Similarity of Names to Those of Existing Corporations.—The rulings of the Executive Department of the Commonwealth of Pennsylvania in granting and refusing charters, are entitled to weight, as being the decisions of officers accustomed to deal constantly and practically with the questions arising in such cases. Rulings made by that department in cases of applications for charters and protests on the grounds of similarity of corporate names, do not have in view — as it seems they should — the purpose of protecting the private rights of existing corporations, domestic or foreign, but the

⁷ *Post*, § 8185.

⁸ *Re Kidd Bros. & Co.*, 17 Pa. Co. Ct. 238; s. c. 5 Pa. Dist. Rep. 56.

⁹ *Re North Fifth Street & Co. Asso.*, 8 Pa. Co. Ct. 15.

¹⁰ *Re Dimes Savings Bank*, 9 Pa. Co. Ct. 369; s. c. 26 W. N. C. (Pa.) 77.

¹¹ *Re Carlin Man. Co.*, 10 Pa. Co. Ct. 667; s. c. 1 Pa. Dist. Rep. 14; 29 W. N. C. (Pa.) 158.

¹² *York Card & Co. v. York Wall*

Paper Co., 15 Pa. Co. Ct. 551; s. c. 4 Pa. Dist. Rep. 128; 35 W. N. C. (Pa.) 574.

¹³ *Re Columbus Security Order*, 27 W. N. C. (Pa.) 36.

¹⁴ *Re Citizens' Trust & Co.*, 9 Pa. Co. Ct. 366; s. c. 27 W. N. C. (Pa.) 437; 8 *Lanc. L. Rev.* (Pa.) 110.

¹⁵ *Re Duquesne College Charter*, 12 Pa. Co. Ct. 491; s. c. 2 Pa. Dist. Rep. 555.

purpose of preventing confusion in the several departments of the State Government with reference to taxation, judicial process, etc.¹⁶ But that department concedes that, where a foreign corporation transacts business within the State, which makes it a legitimate subject of taxation the same as a domestic corporation, it has the same rights as a domestic corporation would have to protest against the incorporation of another company seeking to become incorporated under a name similar to that of the protesting company. Accordingly, an application for a charter was refused where the name under which the charter was sought was the "Bradley Fertilizer Company of Philadelphia," against the objection of a foreign corporation doing business in Pennsylvania, whose corporate name was the "Bradley Fertilizer Company;" simply. The reason was that the creation of the second corporation, under the name above stated, would lead to confusion in the imposing and collection of taxes due the Commonwealth.¹⁷ The Executive Department of the Commonwealth of Pennsylvania refused a charter to the "Gas Company of Altoona" against the protest of the "Altoona Gas Company."¹⁸ The Philadelphia court of Common Pleas refused to approve a charter to the "Waverly Ladies of the Red Cross," in view of the remonstrance of the "Associate Society of the Red Cross of Philadelphia;" but, the applicants having amended their application by inserting in their name the words "Order of," it was approved.¹⁹

§ 8186. **Chartering a Corporation of the Same Name in Another State.**— As is well known, railroad corporations are often re-chartered, so to speak, by the legislatures of other States into which they desire to extend their lines.²⁰ Although the personality of the new corporation is the same as that of the old one, this has the effect of creating for some purposes a new corporation, as for the purposes of Federal jurisdiction, and not a mere license to the old corporation to act within the new State.²¹

§ 8187. **Changing Corporate Name so as to Infringe Name of Existing Corporation.**— A divided court has held it error to refuse

¹⁶ Re Kidd Bros. & Co., (Exec. Rep. 605; s. c. 30 W. N. O. (Pa.) 257. Dept.) 5 Pa. Dist. Rep. 56; s. c. 17 Pa. Co. Ct. 238. Compare as to power of amendment, Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. 662.

¹⁷ Re Bradley Fertilizer Co., 19 Pa. Co. Ct. 271. ²⁰ 1 Thomp. Corp., § 48.

¹⁸ Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. 662. ²¹ Louisville Trust Co. v. Louisville & C. R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

¹⁹ Re Waverly Ladies, 1 Pa. Dist.

the application of the "United States Mortgage Company" to change its name to the "United States Mortgage & Trust Company," against the opposition of the "United States Trust Company of New York," both corporations having been engaged in carrying on the business of making mortgage loans in the city of New York for twenty years, and having extensive foreign connections.²² The dissenting opinion of Van Brunt, P. J., is much to be preferred, holding that such a change would be likely to create confusion between the two corporations in drawing wills, deeds, etc.²³

§ 8188. **Effect of License to a Corporation to Use a Name which an Existing Corporation has Resolved to Adopt.**—The license to form a corporation under a certain name, issued by the Secretary of State of Illinois, gives to such corporation the right to the name, as against an already existing corporation having a different name, which has passed a resolution and given notice of a meeting to vote on a change of its name to that selected by the new corporation,—at least where the promoters of the new corporation did not know, at the time of procuring the license, of the proposed change in the name of the existing corporation. Nor has the Secretary of State in such a case any power to revoke the license granted by him to the new corporation. Nor will a mandamus be granted to compel him to receive and file a certificate of the vote of the old corporation changing its name to that of the new one, as this would result in a confusion between the two corporations.²⁴

§ 8189. **Contract Entered into with a Corporation Under an Assumed Name.**—For a corporation to misname itself in making a contract, throws no greater obstacle in the way of enforcing the contract than would the misnomer of an individual. If the misnomer is pleaded, or if the plea of *nul-tiel corporation* is filed, the corporation will, under a settled rule of pleading, be required to "give the plaintiff a better name,"—that is, it will be required to disclose its real name; in which case the usual replication in a case where the misnomer of an individual defendant is pleaded in abate-

²² Matter of United States Mortgage Co., 83 Hun (N. Y.) 572; s. c. 32 N. Y. Supp. 11; 65 N. Y. St. Rep. 134.

²³ That an English court will not, in granting a petition to reduce capital, at once dispense with the addition of the words "and reduced" to the

company's name, that being necessary as a warning to the public,—see *Re Pinkney & Sons Steamship Co.*, (1892) 3 Ch. 125.

²⁴ *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423; s. c. 16 L. R. A. 429; 31 N. E. Rep. 400.

ment, that the defendant is known by the name under which it has contracted, as well as by the real name which it has disclosed in its plea, would be good. Then the question becomes a mere question of *identity*, and this is in most cases a *question of fact for a jury*.²⁵ At all events, the only questions which can arise in such a case are questions of procedure — questions of mode and detail. The governing principle is perfectly well established that a contract entered into by a corporation under an assumed or fictitious name, may be enforced by either party to it, and that the identity of the corporation may be established by the ordinary modes of proof.²⁶

§ 8190. **Liability of a Corporation which Permits Another to Carry on Business in its Name.**— If one corporation permits another corporation to acquire its business and carry it on in its name, it thereby becomes liable for the engagements of the latter.²⁷

§ 8191. **Presumption where Two Corporations Having a Common Name Execute the same Instrument.**— The presumption from the use of the common name of two corporations having the same name and management and identical in every respect except in the origin of their powers, and in effect general agents of each other, must be that both intended to be bound, in the absence of some specified restriction, in the obligating instrument.²⁸

§ 8192. **Corporation Protected in Equity in the Use of its Corporate Name.**— The doctrine of the author's text²⁹ that the name of a corporation, while not strictly a franchise, is nevertheless in the nature of property, and a necessary element in the existence of the corporation, the exclusive right to use which will be protected in equity on principles analogous to those applied in the protection of *trade-marks*,— has been reaffirmed in several cases and applied to voluntary associations as well as to corporations.³⁰ The principle

²⁵ 1 Thomp. Trials, § 1450, *et seq.*

²⁶ Marmet Co. v. Charleston, 37 W. Va. 778; s. c. 17 N. E. Rep. 299.

²⁷ Davis Provision Co. v. Flower Bros., 20 App. Div. (N. Y.) 626; s. c. 47 N. Y. Supp. 205.

²⁸ Louisville Trust Co. v. Louisville &c. R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

²⁹ 1 Thomp. Corp., § 296.

³⁰ Grand Lodge v. Graham, 96 Iowa, 592, 606; s. c. 31 L. R. A. 133; 65 N. W. Rep. 837; Higgins Co. v. Higgins Soap Co., 144 N. Y. 462; s. c. 39 N. E. Rep. 490; s. c. 71 Hun (N. Y.) 101; Investor Pub. Co. v. Dobinson, 72 Fed. Rep. 603, 606; Fort Pitt &c. Asso. v. Model Plan &c. Asso., 159 Pa. St. 308; s. c. 33 W. N. O. (Pa.) 457; 28 Atl. Rep. 215; 24 Pittsb. L. J. (N. S.) 295; Ger-

under which this protection is extended, was thus clearly expressed by Andrews, C. J.: "In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the State may not affix such corporate names as it may elect, to the entities it creates, but to prevent fraud, actual or constructive. The names of corporations organized under general laws, and in most other cases, are chosen by the promoters; and it would be an easy way to escape from the obligations which are enforced as between individuals, if corporations were granted immunity by reason of their corporate charter."³¹ It is necessarily a part of this doctrine that the certificate of the auditor as to the right of a corporation to a name is not binding upon another body claiming the right to the name;³² and that, as in other cases, the doctrine prior in time, prior in right, prevails; so that the body which *first* becomes entitled to use a particular corporate name, will be protected in the use of that name against another body assuming it.³³ The right to this species of relief may, of course, be lost by assent or acquiescence.³⁴

man &c. Asso. v. Oldenberg &c. Asso., 46 Ill. App. 281; Tussaud v. Tussaud, 44 Ch. Div. 678; s. c. 32 Am. & Eng. Corp. Cas. 11; Hendriks v. Montagu, 17 Ch. Div. 638; Rogers Co. v. Rogers Man. Co., 70 Fed Rep. 1017; Morrow v. Edwards, 20 Wash. L. Rep. 230 (voluntary associations so protected.) Compare New York Battery &c. Co. v. Goodyear Rubber &c. Co., 20 Pa. Co. Ct. 493, where the idea is expressed that, as a general rule, a corporation cannot acquire a trade-name, different from its own name!

³¹ Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 468; s. c. 39 N. E. Rep. 490; quoted in part by the Supreme Court of Iowa in Grand Lodge v. Graham, 96 Iowa, 592, 607. The following cases, some of them already cited by the author, illustrate the exercise of this jurisdiction:—Lee v. Haley, L. R. 5 Ch. App. 155; Holmes &c. Man. Co. v. Holmes &c. Man. Co., 37 Conn. 278; Massam v. Thorley's

Cattle Food Co., 14 Ch. Div. 748; Celluloid Man. Co. v. Gellonite Man. Co., 32 Fed. Rep. 94; Newby v. Oregon &c. R. Co., 1 Deady (U. S.) 609; Rogers Man. Co. v. Rogers &c. Man. Co., 11 Fed. Rep. 495; Le Page Co. v. Russia Cement Co., 51 Fed. Rep. 942.

³² Grand Lodge v. Graham, 96 Iowa, 592; s. c. 31 L. R. A. 133; 65 N. W. Rep. 837.

³³ German Hanoverian &c. Asso. v. Oldenberg &c. Asso., 46 Ill. App. 281.

³⁴ Thus it has been held that a corporation whose name embodies the name of one of its officers cannot object to the use by another corporation of the same surname, where such officer assented to such use when the adoption of the name was under discussion in a formal interview with him as a representative of the former corporation: Clark Thread Co. v. Armitage, 21 C. C. A. 178; s. c. 76 Off. Gaz. 1419.

§ 8193. **Corporation not Protected in Use of Name of Previous Corporation or Voluntary Association.**—The principle on which these decisions proceed, is that the prior lawful use of a name, whether by natural or artificial persons, gives — subject to qualifications which need not now be considered — the exclusive right to its use as against subsequent persons or corporations attempting to appropriate it,—the right to protection not depending upon the fact of incorporation either in the plaintiff or the defendant. This being the principle, it follows that a body of co-adventurers cannot, by procuring themselves to be incorporated under a particular name used by another collection of persons, doing business at the time of the incorporation of the former, under the same or a similar name, whether incorporated or unincorporated, deprive the latter of the right to use the name which they have appropriated.³⁵ On the other hand, where the use by unincorporated persons of a corporate name under which they are afterwards incorporated, is in violation of a statute,³⁶ such use will confer no rights which will be enforced by the courts of the State.³⁷

§ 8194. **When a Man may be Restrained from Using his own Name in the Name of a Corporation.**—While a man will ordinarily not be restrained from using his own name to designate goods of his own manufacture, although it may be to the detriment of another person manufacturing similar goods under a similar name,³⁸ yet a “tricky, dishonest and fraudulent use of a man’s own name for the purpose of deceiving the public and of decoying it to a purchase of goods under a mistake or misapprehension of facts will be prevented.”³⁹ When therefore, a man by the name of Rogers assisted in establishing a corporation, which took his name, for the purpose of inducing the public to think that, in buying the goods of this corporation, they were buying the well-known Rogers silver-

³⁵ Grand Lodge v. Graham, 96 Iowa, 592; s. c. 31 L. R. A. 133; 65 N. W. Rep. 837; Hygeia Water Ice Co. v. New York Hygeia Ice Co., 47 N. Y. St. Rep. 71; s. c. 19 N. Y. Supp. 602.

³⁶ Ill. Rev. Stat., chap. 38, § 220.

³⁷ Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494; s. c. 30 N. E. Rep. 339; aff’g s. c. 40 Ill. App. 430.

³⁸ Rogers v. William Rogers Man. Co., 70 Fed. Rep. 1019.

³⁹ Rogers Co. v. Rogers Man. Co., 70 Fed. Rep. 1017; William Rogers Man. Co. v. Rogers Man. Co., 11 Fed. Rep. 498; William Rogers Man. Co. v. Simpson, 54 Conn. 527; s. c. 9 Atl. Rep. 395; Rogers v. Rogers, 53 Conn. 121; s. c. 1 Atl. Rep. 807; dissenting opinion in 5 Atl. Rep. 675; Gato v. El. Modello Cigar Man. Co., 25 Fla. 886; s. c. 6 L. R. A. 823

plated ware, "and, for the purpose of surreptitiously obtaining the advantage of the good reputation which other manufacturers had given to articles stamped with that name," and thereby committing an intentional fraud on the public, the corporation so created was enjoined from selling silver-plated table-ware stamped with the mark "R. W. Rogers Co," which was its corporate name.⁴⁰

§ 8195. What if Infringing Body is Engaged in an Unlawful Undertaking.—Where the facts do not otherwise entitle the complaining corporation to relief, the fact that the defendants may, under a name similar to that of the plaintiff, be engaged in an unlawful undertaking—such as carrying on the business of life insurance in violation of the State law—will not entitle the plaintiff to have the defendants enjoined from using the plaintiff's name in such business; since the question whether the defendant is engaged in an unlawful business is collateral to the particular action, being a question more properly determined in a proceeding by the State against the offending body.⁴¹

§ 8196. Laches in Making Application Bars Relief.—Assuming that a corporation has, under the principles here stated, the exclusive right to be protected in the use of its corporate name as against another body using the same or a similar name in its business, nevertheless the former may lose the right to equitable relief by its *laches* in not applying for it within a reasonable time. Let us suppose, for instance, that a corporation engaged in life insurance on the assessment plan, has been incorporated under a certain name, and that another organization was, at the time of the incorporation of the former, doing a similar business under a similar plan and name, though not incorporated; that the corporation delays for, let us say, ten years in suing to have the voluntary association restrained from carrying on its business under the name in question; and that, during this time, the voluntary association has acquired great numbers of new members who cannot re-insure without great loss;—here, assuming that the corporation has, as against the voluntary association, the right to be protected

⁴⁰ Rogers Co. v. Rogers Man. Co., Rogers &c. Man. Co., 11 Fed. Rep. 70 Fed. Rep. 1017; aff'g s. c. 66 Fed. 495.
⁴¹ Grand Lodge v. Graham, 96 Iowa, 592; s. c. 31 L. R. A. 133; 65 N. W. Rep. 837.

in the exclusive use of its corporate name, — it would be grossly inequitable to allow the right to be exercised after such a delay and under such circumstances.⁴²

§ 8197. Circumstances of Acquiescence and Estoppel Precluding this Relief.— The action of the complaining corporation, or even of one of its principal officers, may be such as to create an estoppel such as will prevent it from having an injunction against a junior corporation, restraining it from doing business under a corporate name similar to that of the complainant.⁴³

§ 8198. Questions of Procedure in Such Cases.— If the application for such an injunction is erroneously dismissed, on an appeal, the Supreme Court, having the whole matter before it as matter of record, may enter the proper decree disposing of the whole matter.⁴⁴

§ 8199. Form of Relief.— In two English cases an injunction went to restrain the defendant, until trial or further order, from registering under the Companies Act any company to be incorporated under the infringing name.⁴⁵

§ 8200. Doctrine that Equity Will not Interfere in Such Cases.— The foregoing must be regarded as an exception to the general doctrine that courts of equity have no jurisdiction, in the absence of statutory authorization, to enjoin a corporation from carrying on the business for which it has been chartered by the State,— the reason being that this is tantamount to decreeing a dissolution of the corporation, and that a corporation can only be dissolved by

⁴² Grand Lodge v. Graham, 96 Iowa, 592; s. c. 31 L. R. A. 133; 65 N. W. Rep. 837. That a similar rule prevails with reference to enjoining the counterfeiting of *trade-marks*, requiring such proceedings to be brought promptly after discovery, see McLean v. Fleming, 96 U. S. 245, 258; Amoskeag Man. Co. v. Garner, 55 Barb. (N. Y.) 151; Filley v. Child, 16 Blatchf. (U. S.) 376; s. c. Fed. Cas. No. 4787.

⁴³ Of which a good illustration will be found in Clark Thread Co. v. Armitage, 74 Fed. Rep. 936; s. c. 45 U. S. App. 62; 21 C. C. A. 178; 78

Off. Gaz. 1419; modifying and affirming s. c. 67 Fed. Rep. 896:

⁴⁴ Fort Pitt &c. Asso. v. Model Plan &c. Asso., 159 Pa. St. 308; s. c. 33 W. N. C. (Pa.) 457; 28 Atl. Rep. 215; 24 Pittsb. L. J. (N. S.) 295.

⁴⁵ Hendriks v. Montagu, 17 Ch. Div. 638; Tussaud v. Tussaud, 44 Ch. Div. 678, 693; s. c. 32 Am. & Eng. Corp. Cas. 11. On a similar state of facts, but under the Massachusetts statute, an injunction was withheld: American Order of Scottish Clans v. Merrill, 151 Mass. 558; s. c. 8 L. R. A. 320.

a proceeding at law in the nature of a *quo warranto* instituted by the State.⁴⁶ Upon this ground — believed to be untenable — injunctions have been denied to one corporation to restrain another corporation from doing a similar business under a similar corporate name subsequently appropriated.⁴⁷ In Massachusetts a seeming indifference to justice has led the court to refuse an application for an injunction to restrain the organization, under a general law, of a corporation having a name which infringes that of an existing corporation,— the reasoning of the court being too trifling to quote.⁴⁸ In Wisconsin a mutual benefit society cannot assert, in an action to enjoin another society with a somewhat similar name from transacting business under such name, that the franchises of the latter had been forfeited or that its incorporation was illegal; but this question can be raised only in a proceeding instituted for that purpose by the State.⁴⁹

§ 8201. Distinction in this Respect Between Corporations Created by Special Charters and those Formed under General Laws.—

With respect to this question a distinction has been taken between cases where incorporators voluntarily assume a name in organizing a corporation under a general law, and where their name is given to them by the legislature in a special act of incorporation. In the former case, it is conceded that they assume the name at the peril of being ousted of the right to use it if it conflicts with the trade name of a preceding body. In the latter case, it is reasoned that “the act of incorporation has fixed the name which the corporation is to bear, and its right to use that name is part of its franchise, conferred on it by law, which can no more be annulled at the suit of private persons than can its franchise to be a corporation.”⁵⁰ This supposed distinction is without foundation in reason; since whether the co-adventurers procure themselves to

⁴⁶ 4 Thomp. Corp., § 4538; 5 Id., § 6703.

⁴⁷ *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436; *Independent Order of Foresters v. United Order of Foresters*, 94 Wis. 234; s. c. 68 N. W. Rep. 1011; 5 Am. & Eng. Corp. Cas. (N. S.) 230. The view of the author of this doctrine is untenable, as stated in 1 Thomp. Corp., § 296.

⁴⁸ *American Order of Scottish Clans*

v. Merrill, 151 Mass. 558; s. c. 8 L. R. A. 320. *Contra* in England: *Hendriks v. Montagu*, 17 Ch. Div. 638; *Tussaud v. Tussaud*, 44 Ch. Div. 678, 693.

⁴⁹ *Supreme Court v. Supreme Court*, 94 Wis. 234; s. c. 68 N. W. Rep. 1011; 5 Am. & Eng. Corp. Cas. (N. S.) 230.

⁵⁰ *Paulins v. Portuguese Benef. Asso.*, 18 R. I. 165, 167; s. c. 20 L. R. A. 272; 26 Atl. Rep. 36.

be incorporated by a special act of the legislature, or by articles of incorporation under a general law, they choose their own corporate name; and neither the action of the legislature in the one case, nor that of a ministerial officer like the Secretary of State in the other, can be regarded as an *adjudication* of their right to use it to the prejudice of a previously existing body, corporate or unincorporate, who have never been heard on the question. And the proposition to remit the body, whose rights are thus infringed, to the discretion of the Attorney-General of the State, who may or may not see fit to bring an action to oust the infringing corporation from the use of the infringing name, involves a strange ignorance or perversion of justice. This supposed distinction is more frequently neglected than attended to by the courts. In Massachusetts, for instance, a certificate of incorporation granted by the Secretary of the Commonwealth to a corporation organized under a general statute, is deemed to be *conclusive*, as against a pre-existing corporation having a similar name, of the right of the junior corporation to bear the name under which, however inadvertently, the Secretary of the Commonwealth has allowed it to become incorporated; and a petition for leave to file an information in the nature of a *quo warranto* to oust it of its name was refused.⁵¹ A decision proceeding in a greater carelessness of justice can scarcely be found within the lids of a law-book.

§ 8202. Names Descriptive of Places or Employments not Enjoined.— It is a principle in the law of *trade-marks* that “no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation.”⁵² On this principle, an injunction was denied by the Supreme Court of Illinois at the suit of a corporation chartered as “The Elgin Butter Company”, to restrain another corporation doing the same business at the same place, known as

⁵¹ Boston Shoe &c. Co. v. Boston Rubber Co., 149 Mass. 436.

⁵² Canal Co. v. Clark, 13 Wall. (U. S.) 311, 327. To the same effect, see Candee v. Deere, 54 Ill. 439; Bolander v. Peterson, 136 Ill. 215; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Laughman's Appeal, 123 Pa. St. 1; Brown

Chemical Co. v. Meyer, 139 U. S. 540; Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598; Rumford Chemical Works v. Muth, 35 Fed. Rep. 524; Koehler v. Sanders, 122 N. Y. 65. See also York Card &c. Co. v. York Wall Paper Co., 15 Pa. Co. Ct. 554.

"The Elgin Creamery Company," from continuing its business under its corporate name. The court proceeded on two grounds: 1. That, in the absence of a fraudulent intent on the part of the defendant company to appropriate the name of the plaintiff company, there was not a sufficient similarity between the two names to warrant a court of equity in restraining the defendant from using its corporate name; and, 2. That the plaintiff could not, by appropriating the geographical name "Elgin," and the generic names "creamery" and "butter" upon its labels, make it unlawful for any body of persons to engage in the same business at the same place, using the name of the place and the name of the subject of their manufacture in their corporate name. The court also reasoned that, in the absence of fraud, a corporation has the same right to use its corporate name in its business that an individual has,⁵³—a proposition which is more doubtful. On the same ground, a foreign corporation named "The Employers' Liability Assurance Corporation, Limited," was not entitled to the exclusive use of the words "Employers' Liability" in its corporate name, as against an American company named "The Employers' Liability Insurance Company," although confusion might result from the use of the expression "Employers' Liability" in the name of an American company: the words being descriptive of a well-known business.⁵⁴

⁵³ *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127; s. c. 40 N. E. Rep. 616.

⁵⁴ *Employers' Liability Assurance Corp. v. Employers' Liability Insurance Co.*, 61 Hun (N. Y.) 552; s. c. 41 N. Y. St. Rep. 390; 10 N. Y. Supp. 845. That the prohibition in Neb. Sess. Laws 1891, chap. 14, against the use of distinctive terms relating to

building and loan associations to designate corporations of a different class, does not apply to corporations organized in 1887,—see *York Park Build. Asso. v. Barnes*, 39 Neb. 834; s. c. 58 N. W. Rep. 440. Granting a change of name, but requiring alteration so as to show change of sphere of operations; *Re Indian Mechanical Gold Extracting Co.*, (1891) 3 Ch. 538.

CHAPTER CCVI.

IRREGULAR AND DE FACTO CORPORATIONS.

SECTION

8206. What is a corporation *de jure*?
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SECTION

8211. Failure to comply with provisions as to creation of a capital stock and distribution of shares.
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§ 8206. What is a Corporation De Jure? — A corporation *de jure* is said to be one whose right to exercise a corporate function would prove invulnerable if assailed by the State in *quo warranto* proceedings.¹ An intended corporation cannot become such *de jure* where an essential step required by statute to be taken as a prerequisite to incorporation is omitted entirely,— as a failure to file articles of incorporation,² or filing them in the wrong county.³

§ 8207. What Constitutes a Corporation De Facto.— The definition given by Selden, J., of a corporation *de facto* in a recent case was this: “ 1. The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and, 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law.”⁴ It is perceived

¹ Capps v. Hastings Prospecting Co., 40 Neb. 470; s. c. 24 L. R. A. 259; 28 N. W. Rep. 956.

² Capps v. Hastings Prospecting Co., 40 Neb. 470; s. c. 24 L. R. A. 259; 58 N. W. Rep. 956.

³ Martin v. Deetz, 102 Cal. 55; s. c. 36 Pac. Rep. 368.

⁴ Methodist &c. Church v. Pickett, 19 N. Y. 482, 485; criticised in Finnegan v. Noerenberg, 52 Minn. 239, 243; s. c. 18 L. R. A. 778; 53 N. W. Rep.

that, under this statement of doctrine, if a collection of men assume merely to use corporate powers, which they might have acquired by complying with the law,—that is, assume merely to call themselves a corporation and to act as such,—this makes them such as to all persons save the State. It has been pointed out that this statement is defective in that it leaves out of view any *attempt to organize* a corporation under a charter or an enabling statute.⁵ We must, then, reform the above definition so as to say that a corporation *de facto* exists when there is: 1. A charter or statute under which a corporation with the powers assumed might have been organized.⁶ 2. A *bona fide* attempt to organize a corporation under such charter or statute. 3. An actual *user* of the corporate powers, or some of them, which might have been rightfully used by such an organization.⁷ Such being the proper conception of a corporation *de facto*, it follows that a substantial compliance

1150. Compare *East Norway &c. Church v. Froislie*, 37 Minn. 447, where the New York definition is seemingly adopted; and also in *Re Gibb's Estate*, 157 Pa. St. 59; s. c. 22 L. R. A. 276; 27 Atl. Rep. 383.

⁵ *Finnegan v. Noerenberg*, *supra*. It has been held that if there has been *no attempt to organize*, under some law before the parties assume to act as a corporation, the concern is not even a *de facto* corporation, but a sham and fraud, and all connected with it will be held liable as copartners, and not as members of a corporation: *Bradley Fertilizer Co. v. South Pub. Co.*, 4 Misc. (N. Y.) 172; s. c. 53 N. Y. St. Rep. 214; 23 N. Y. Supp. 675; *revg.* 1 Misc. (N. Y.) 512; 49 N. Y. St. Rep. 924; 21 N. Y. Supp. 472. On the contrary, the doctrine that mere *user* of corporate powers makes the usurping body a corporation *de facto*, was thus expressed by Mr. U. S. Circuit Judge Taft: "When persons assume to act as a body, and are permitted by the acquiescence of the public and the State so to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by law to do so."

Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. Rep. 642, 650. This inaccurate definition was not called for, because the parties making the objection were *estopped* from making it, by reason of having dealt with the corporation as such: See 1 *Thomp. Corp.*, § 518; 6 *Id.*, §§ 7647, 7658.

⁶ That there can be no *de facto* corporation in the absence of a statute authorizing the organization of a *de jure* corporation,—see *Guthrie v. Territory*, 1 Okla. 188; s. c. 21 L. R. A. 841; 39 Am. & Eng. Corp. Cas. 344; 31 Pac. Rep. 190; *Duke v. Taylor*, 37 Fla. 64; s. c. 31 L. R. A. 484; 19 South. Rep. 172; 3 Am. & Eng. Corp. Cas. (N. S.) 261; *Hanstein v. Johnson*, 112 N. C. 253; s. c. 17 S. E. Rep. 155. Compare *Bain v. Clinton Loan Asso.*, 112 N. C. 248; s. c. 17 S. E. Rep. 154. That no corporation *de facto* can be created by an *attempted consolidation* where there is *no law* permitting a consolidation,—see *American Loan &c. Co. v. Minnesota &c. R. Co.*, 157 Ill. 641; s. c. 42 N. E. Rep. 153. For the same doctrine applied to a public office, see *Norton v. Shelby County*, 118 U. S. 425.

⁷ This definition, in the author's language, is, in substance, the definition given in *Finnegan v. Noerenberg*, *supra*; and in *Re Gibbs's Estate*, 157 Pa. St. 59; s. c. 22 L. R. A. 276; 23 W. N. C. (Pa.) 120; 24 Pitts. L. J. (N. S.) 135; 27 Atl. Rep. 383.

with the law in effecting a corporate organization, is not necessary to constitute the body and corporation *de facto*, because that makes it a corporation *de jure*.”⁸

§ 8208. **What Constitutes a Sufficient Attempt to Organize and a Sufficient User to make a Corporation De Facto.**— Taking subscriptions to and issuing stock, electing managers and directors, adopting by-laws, buying a lot, and constructing and leasing a building upon it, have been held to constitute a sufficient *user* to constitute a *de facto* corporation which will prevent liability of the members as partners under a statute authorizing the formation of corporations for such business.⁹ So, for the purpose of having a standing in court and of being able to maintain an action, a corporation *de facto* is formed by the meeting of the incorporators named in a statute creating a corporation *in praesenti*, on a day of which notice has actually been given, for subscription to the capital stock, their verbal agreement to take a certain number of shares each, and the giving of their checks as a first payment on account of such subscriptions, with a meeting duly called and held for the election of directors, and annual and other meetings of stockholders and directors; although the checks are not used because no works are undertaken, and are returned to the directors, but the expense of procuring the charter and of organization and proceedings has been assessed upon and borne by the stockholders equally, and no indebtedness remains unpaid.¹⁰

§ 8209. **What Attempts at Organization and User do not Create a Corporation De Facto.**— It has been held by the Supreme Court of Florida that an attempted organization of a corporation under the statute law of Tennessee, which organization was completed, or attempted to be completed in Florida, which organization thereafter did business in Florida as a corporation, but which did not attempt to organize under the law of Florida,— was not even a corporation *de facto*, but its members were liable as partners on a note signed by its corporate name.¹¹ Where the articles of incorporation state

⁸ Finnegan v. Noerenberg, 52 Minn. 239; s. c. 18 L. R. A. 778; 53 N. W. Rep. 1150.

⁹ Finnegan v. Noerenberg, 52 Minn. 239; s. c. 18 L. R. A. 778; 53 N. W. Rep. 1150.

¹⁰ Union Water Co. v. Kean, 52 N.

J. Eq. 111; s. c. 27 Atl. Rep. 1015; 44 Am. & Eng. Corp. Cas. 13.

¹¹ Duke v. Taylor, 37 Fla. 64; s. c. 31 L. R. A. 484; 3 Am. & Eng. Corp. Cas. (N. S.) 261; 19 South. Rep. 172; quoting Taylor v. Branham, 35 Fla. 297; s. c. 17 South. Rep. 552.

one county to be the principal place of business of the proposed corporation, and, instead of being filed in that county, as required by the statute, the articles are filed in another county, the corporation does not become a corporation *de jure*; and if, after such an attempt at incorporation, the directors named in the articles never meet, and no stock is ever issued, no by-laws established, no corporate seal adopted, no corporate meeting held, and no directors subsequently elected,—the pretended corporation is not even a corporation *de facto*, but its existence may be questioned in a private action.¹²

§ 8210. Conditions Precedent to Corporate Existence where Corporations are Created under General Enabling Statutes.—“It is essential to the creation of a corporation under an enabling statute, that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective, are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when, therefore, successive steps are prescribed for the creation of corporations, these must obviously be regarded as imperative. Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other mode of doing the act which they authorize; they must be strictly construed. Hence, it has been uniformly held that requirements in respect of filing charters are imperative.”¹³ This statement of doctrine epitomizes the law of the subject, but with the qualification that all courts are not agreed that an exact fulfillment of the requirements of the statute with regard to filing the articles is imperative: a substantial compliance will be sufficient unless the State challenges the rightfulness of the existence of the corporation.¹⁴ But, under all sound theories, a substantial compliance is necessary. For example, if

¹² Martin v. Deetz, 102 Cal. 55; s. c. 36 Pac. Rep. 368.

¹³ Guckert v. Hacke, 159 Pa. St. 303, 306; s. c. 34 W. N. C. (Pa.) 41; 44 Pitts. L. J. (N. S.) 269; 28 Atl. Rep. 249; opinion of the Court by Mr. Jus-

tice Sterrett; citing Childs v. Smith, 55 Barb. (N. Y.) 45; Smith v. Warden, 86 Mo. 382; Abbott v. Smelting Co., 4 Neb. 416.

¹⁴ 1 Thomp. Corp., § 507, *et seq.*

the preliminary agreement for the formation of a corporation under the statute of West Virginia,¹⁵ is not *acknowledged* before the issue of the certificate of incorporation, the company does not obtain corporate existence as to those who subscribe for stock by such preliminary agreement, and such subscription is not binding on them.¹⁶ Moreover, a fundamental variance between the certificate of incorporation and such preliminary agreement will relieve from his liability as a stockholder one who subscribed for shares upon the faith of this preliminary agreement.¹⁷ On the same principle, a failure to record the certificate of incorporation "in the office for the recording of deeds in and for the county where the chief operations are carried on," in compliance with a statute of Pennsylvania,¹⁸ will render the incorporators liable to persons who deal with them without knowledge of the attempted incorporation.¹⁹

¹⁵ W. Va. Code, chap. 54, § 6.

¹⁶ Greenbrier Industrial Expo. v. Rodes, 37 W. Va. 738; s. c. 7 Am. R. & Corp. Rep. 653; 17 S. E. Rep. 305.

¹⁷ Greenbrier Industrial Expo. v. Rodes, *supra*.

¹⁸ Pa. Act of Apr. 29, 1874; P. L. 77.

¹⁹ Guckert v. Hacke, 159 Pa. St. 303; s. c. 34 W. N. O. (Pa.) 41; 24 Pitts. L. J. (N. S.) 269; 28 Atl. Rep. 249. That a statute providing that persons named and all others who may be associated with them "shall be and are hereby constituted and declared to be a body politic and corporate" creates a corporation *in praesenti* composed of the persons named; and provisions for subscribing to the capital stock, and payments thereon, are not conditions precedent to corporate existence: Union Water Co. v. Kean, 52 N. J. Eq. 111; s. c. 44 Am. & Eng. Corp. Cas. 13; s. c. 27 Atl. Rep. 1015. That a company operating a road built of stone and gravel, under Mich. Acts 1867, No. 47, amending Mich. Act 1851, No. 155, providing for the formation of companies to construct plank roads, by giving companies constructing stone and gravel roads the same privileges and franchises as a plank-road company, comes within the exception to Mich. Const. art. 15, § 10, providing that no corporation except for municipal purposes or for the con-

struction of railroads, plank roads, and canals, shall be created for a longer period than thirty years: Canal Street Gravel-Road Co. v. Paas, 95 Mich. 372; s. c. 54 N. W. Rep. 907. That a joint stock company does not become a corporation *ipso facto* on its organization, under N. C. Const. art. 8, §§ 1, 3, providing that corporations may be formed under general laws, but shall not be created by special act, and that the term "corporation" shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships: Hanstein v. Johnson, 112 N. C. 253; s. c. 17 S. E. Rep. 155. That a gas company organized under a statute providing that it shall have three years to organize and commence the transaction of its business, and that it shall furnish gas within three years at \$2 per thousand feet, passed when the price of gas is \$3 per thousand feet, which does nothing for ten years and until the price of gas is fixed at \$1.50 per thousand feet, cannot exercise corporate powers; since the provision of the New York statute, that if a company does not organize and commence the transaction of its business within one year from its incorporation its corporate powers shall cease, is *self-executing*: People v. Equity Gas Works Constr. Co., 3 Misc. (N. Y.) 333; s. c. 52 N. Y. St. Rep.

§ 8211. Failure to Comply with Provisions as to Creation of a Capital Stock and Distribution of Shares.—In Ohio, where the State is a party to the controversy, and the question relates to the existence *de jure* of a corporation, it is not sufficient, in pleading that a certain corporation has been organized, merely to allege that “articles of incorporation have been made and filed and recorded in the office of the Secretary of State;” since “articles of incorporation do not make an incorporated company—they are simply authority to do so.” Such a pleading is defective in not averring that officers or directors have been chosen, that any of the stock has been subscribed, or that any organization whatever has been perfected.²⁰ The failure of those who pretend to organize an insurance company, to create the capital stock required by the gov-

317; 23 N. Y. Supp. 124. That an attempt to organize a corporation is ineffectual when the call thereof is signed only by corporators who have signed a previous call under which an organization has been had,—especially where a majority of the corporators named in the statute creating the corporation do not attend at the time and place fixed for opening the books as required by statute: Union Water Co. v. Kean, 52 N. J. Eq. 111; s. c. 27 Atl. Rep. 1015; 44 Am. & Eng. Corp. Cas. 13. Necessity of filing a certificate of incorporation in the county recorder's office under Illinois statute, as a condition precedent to assuming corporate powers: Loverin v. McLaughlin, 46 Ill. App. 373. That the failure to record the articles under the Pennsylvania Act of 1874, does not leave the stockholders liable as partners to one who has dealt with them as a corporation and has not been misled thereby, since the corporation exists *de facto* when the articles have been approved by the Governor and letters patent have been issued,—see Pierce v. Hacke, 1 Pa. Dist. Rep. 517; s. c. 23 Pitts. L. J. (N. S.) 8. The omission, from the copies of the articles of association of a corporation sent by the Secretary of State to the recorder's office of the county where the corporation is located, of the number of years constituting its term of existence, does not render its members liable as partners, when the original articles and the copy kept in the corpo-

ration's book correctly state such term: Rendall v. Jackson, 1 Pa. Dist. Rep. 726. That the condition in the Code of Georgia, § 1676, requiring ten per cent of the capital to be paid in before the corporation commences business is still in force,—see Branch v. Augusta Glass Works, 95 Ga. 573; s. c. 23 S. E. Rep. 128. That a failure to notify certain subscribers, whose presence was not necessary to make up half the capital stock, of the first meeting of the corporation as required by a statute, does not prevent it from acquiring a legal existence,—see Nickum v. Burckhardt, 30 Or. 464; s. c. 47 Pac. Rep. 788; rehearing denied in 48 Pac. Rep. 474. That, under the Virginia Code, the lodging of the charter granted by the court in the office of the Secretary of State creates a *de facto* corporation from that date,—see Martin v. South Salem Land Co., 94 Va. 28; s. c. 2 Va. Law Reg. 743; 26 S. E. Rep. 591; 6 Am. & Eng. Corp. Cas. (N. S.) 312. That a call upon the subscribers to the capital for a balance due is not a *transacting of business* within the meaning of a statute prohibiting corporations from transacting business until certain things have been done,—see United Growers Co. v. Eisner, 22 App. Div. 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906.

²⁰ State v. Insurance Co., 49 Ohio St. 440, 446; s. c. 28 Ohio L. J. 26; 21 Ins. L. J. 673; 20 Wash. L. Rep. 485; 31 N. E. Rep. 658.

erning statute, and to cause the amount to be paid in which the statute requires, entitles the State to a judgment of ouster against them.²¹ In other words, a provision of the charter of a corporation, authorizing it to do business if a certain amount of its capital stock shall be subscribed and paid in within a specified time, makes such subscription and payment within such time conditions precedent to the legal organization of the company; and a failure in this particular will justify a proceeding by the Attorney-General to forfeit the company's charter.²² The principle has been carried further. In a contest between individuals, it has been held that where persons attempt to organize a corporation, but go no further than file articles of incorporation in the office of the Secretary of State, and then, without raising the capital stock which the law requires, incur debts in the name of the incorporation, the persons so proceeding are answerable for such debts as partners.²³ The decision is perfectly sound, and it is not necessary to recur to the question whether such a body is a corporation *de facto* or *de jure* to vindicate it; nor is there any principle of estoppel which will cut off the remedy of the creditor against the members of such a body, unless he has given credit to the body with full knowledge of the facts. The true principle is that the State grants to the individuals who compose a corporation immunity from liability for its debts, on condition that they create and fill up the joint stock or joint fund prescribed by the governing statute. If, without doing this, and without letting the public know that they have done it, they commence doing business as a corporation, and in that character contract debts, they are clearly answerable for the payment of those debts on either of two theories,—breach of warrant of agency, or fraud: they have professed to contract debts as the agents of a corporation which does not rightfully exist, and they have defrauded the creditor into giving credit to the non-existent body by representing to him it has the capital stock or fund to answer for its debts, which the law requires it to have; whereas, through their wrong, no such capital stock or fund has been raised.²⁴ In an action by an alleged corporation to recover

²¹ State v. Webb, 97 Ala. 111; s. c. Falls Road Co. v. Benson, 8 Up. Can. 12 South. Rep. 377. (Q. B.) 307.

²² Dominion Salvage & W. Co. v. Attorney-General, 21 Can. S. C. 72. ²³ Walton v. Oliver, 49 Kan. 107; s. c. 12 Rail. & Corp. L. J. 94; 30 Pac. Rep. 172.
See also Eastern Archipelago Co. v. The Queen, 2 El. & Bl. 856; Niagara ²⁴ See Hurt v. Salisbury, 55 Mo.

from its subscriber to its shares the amount of his subscription, the same having been made after articles of association were filed, but prior to the organization of the company, it has been held that there can be no recovery because there is no corporation, unless the statutory amount is subscribed *after* the filing of the articles of incorporation. The reasoning of the court is that conditional subscriptions to the capital stock of a corporation, made before the organization thereof, cannot be counted in determining whether the requisite amount of stock has been subscribed to authorize the organization of the corporation, where such conditional subscribers cannot become shareholders until after its organization, because the conditions cannot be fulfilled until then.²⁵ A better view would seem to be that an inchoate subscription is a *proposal* which the corporation can accept when it comes into existence, so as to make a binding contract.²⁶ In considering whether the failure to fill up a capital stock has left the corporation without a legal organization, reference must constantly be had to the governing statute. In the absence of any requirement in the charter of a corporation, or in the general law, that a joint stock shall be raised before the corporation can enter upon the work which it was created to perform, it can, on this ground, plead its non-existence as a corporation when sued as such by a private individual.²⁷

§ 8212. Question of the Rightfulness of the Existence of a De Facto Corporation not Raised in a Collateral Proceeding.— Recent decisions affirm the constantly recurring proposition — worth much or little according to the circumstances under which it is applied

310; 1 Thomp. Corp., §§ 239, 240, 417, 419; 2 Id., § 2975.

²⁵ Fairview &c. R. Co. v. Spillman, 23 Or. 587; s. c. 32 Pac. Rep. 688.

²⁶ 1 Thomp. Corp., § 1170; Greenbrier Industrial Expo. v. Rodes, 37 W. Va. 738; s. c. 17 S. E. Rep. 305; 7 Am. R. & Corp. Rep. 653.

²⁷ McGinty v. Althol Reservoir Co., 155 Mass. 183; s. c. 29 N. E. Rep. 510. The New Jersey Act relative to banking, savings, trust, guaranty, safe deposit, indemnity, mortgage, investment and loan and building corporations, approved June 10, 1890, (P. L. 427) requiring them to have a capital of not less than \$100,000 and the approval of the bank commissioners, does

not apply to a safe deposit company organized under the general corporation law "to keep and maintain safe deposit vaults and safes and strong boxes for the safe keeping of valuable articles and property of all kinds: Hull v. Kelsey, 53 N. J. L. 590; s. c. 5 Bank. L. J. 289; 22 Atl. Rep. 342. Construction of New York statute (N. Y. Laws of 1850, chap. 140, § 2), providing that the articles of association of a railroad company shall not be filed until at least \$1,000 for every mile proposed to be built is subscribed, and 10 per cent paid thereon in good faith: Beattys v. Solon, 64 Hun (N. Y.) 120; s. c. 45 N. Y. St. Rep. 899; 19 N. Y. Supp. 37; s. c. modified, 136 N. Y. 662.

or misapplied — that if a corporation has a *de facto* existence, the question whether it exists lawfully cannot be litigated between private parties, or between a private party and the corporation, but can only be raised by the public authority in the manner provided by law.²⁸ It cannot, for example, be raised by parties who derive their only standing in court to make the objection through the assertion that, on contracts with such corporation, they have recovered and hold an unsatisfied judgment against it.²⁹ So, the existence of a plaintiff as a corporation, and the rightfulness of its exercise of a corporate franchise, cannot be questioned in an action to enforce a *penalty* imposed by statute for passing a *tollgate* without paying toll.³⁰ So, a transfer of property by or to a corporation *de facto* is valid and binding as against all parties except the State.³¹ Therefore, if a person who derives his title to land from the deed of a *de facto* corporation, brings an action to recover for a *trespass* upon the same, the deed cannot be called in question on the ground that the corporation did not rightfully exist.³² So, the failure of a railway company to comply with a requirement of its charter that it must be registered in any counties, other than that of its principal offices, where it establishes agencies, although it may be sufficient to subject the company to a proceeding for a forfeiture, is not ground for questioning its corporate existence, in a collateral proceeding, after registration in the county of its principal office.³³ So, a body exercising corporate functions cannot set up, as a defense to a proceeding for a man-

²⁸ Smith v. Mayfield, 163 Ill. 447; s. c. 45 N. E. Rep. 157; State v. Egg Harbor, 55 N. J. L. 245; s. c. 26 Atl. Rep. 89; Singer &c. Stone Co. v. Hutchison, 72 Ill. App. 366; s. c. 15 Nat. Corp. Rep. 593; Re New Gas Light Co., (Exec. Dept.) 1 Dauph. Co. Rep. (Pa.) 22; s. c. 7 Pa. Dist. Rep. 151; Taylor v. Portsmouth &c. Street R. Co., 91 Me. 193; s. c. 39 Atl. Rep. 560 (that a private person cannot claim charter void for *constitutional* reasons); Hinchman v. Philadelphia &c. Turnp. Road Co., 160 Pa. St. 150; s. c. 34 W. N. C. (Pa.) 129; 28 Atl. Rep. 652; Travaglini v. Societa Italiana, 5 Pa. Dist. Rep. 441 (holding that a charter party on the ground of having been obtained by *fraud*); Dubs v. Egil, 167 Ill. 514; s. c. 47 N. E. Rep. 766.

²⁹ Andrews v. National Foundry &c. Works, 77 Fed. Rep. 774; s. c. 46 U. S. App. 619; s. c. 36 L. R. A. 153; 23 C. C. A. 454; denying rehearing in 36 L. R. A. 139; 46 U. S. App. 281; 5 Am. & Eng. Corp. Cas. (N. S.) 67; 22 C. C. A. 110; 76 Fed. Rep. 166; Walton v. Oliver, 49 Kan. 107; s. c. 12 Rail. & Corp. L. J. 94; 30 Pac. Rep. 172.

³⁰ Canal Street Gravel Road Co. v. Paas, 95 Mich. 372; s. c. 54 N. W. Rep. 907. So also Pontiac &c. Plankroad Co. v. Hilton, 69 Mich. 115.

³¹ Finch v. Ullmann, 105 Mo. 255; s. c. 16 S. W. Rep. 863.

³² Crenshaw v. Ullman, 113 Mo. 633; s. c. 20 S. W. Rep. 1077.

³³ Anderson v. Middle &c. R. Co., 91 Tenn. 44; s. c. 17 S. W. Rep. 803.

damus to compel it to reinstate a member whom it has expelled, that it is not a corporation.³⁴ As the State alone can question the rightfulness of the existence of a corporation irregularly organized, so it can *heal* the irregularity by a *curative act* of legislation. A special act of the legislature, passed within the purview of the Constitution, recognizing a corporation as a valid existing one, and authorizing it to exercise corporate rights, cures all charter defects in its original certificate of organization.³⁵

§ 8213. Estoppel to Deny Corporate Existence.—In the absence of fraud, or of a misrepresentation, expressed, or implied from a negative concealment, a party who deals with a body assuming to act as a corporation, by contracting with it as such, becomes estopped, in a subsequent action on the contract, from denying its corporate existence.³⁶ But the rule cannot be universal. Persons who profess to be a corporation, profess before the public that they have filled up the capital stock or joint fund, which the law allows them to substitute for their personal credit. If, without having done this, they make and take contracts as a corporation, the other contracting party not being apprised of their omission, can any fair-minded man say that they have not cheated him? In such a case they ought to be, and according to the best opinion, are liable to him as partners or joint undertakers; and it is quite immaterial whether their liability is on the principle of fraud or of breach of warranty of agency.³⁷ Without such knowledge, or the existence of some circumstance to put the creditor upon inquiry, there can be no estoppel against him; and it has been held that the mere fact of dealing in a name which may be that of a partnership or of a corporation, is not sufficient to put him on inquiry,—such as the name of Hughes & Gawthorp Co.³⁸ Under such circumstances, the mere acceptance of a note in the name above given by one who has performed work for the makers does not create an estoppel against him.³⁹

§ 8214. Burden of Proof on Question of Corporation or no Corporation.—This depends entirely upon the nature and frame of the

³⁴ *Meurer v. Detroit Musicians' Benev. &c. Asso.*, 95 Mich. 451; s. c. 54 N. W. Rep. 954.

³⁵ *Koch v. North Ave. R. Co.*, 75 Md. 222; s. c. 15 L. R. A. 377; 23 Atl. Rep. 463.

³⁶ 1 *Thomp. Corp.*, § 518; 6 *Id.*, §§ 7647, 7658.

³⁷ See *ante*, § 8210.

³⁸ *Guckert v. Hacke*, 159 Pa. St. 303.

³⁹ *Guckert v. Hacke*, *supra*.

issues. The general burden is upon the party who affirms a fact essential to his recovery, to prove it. If, therefore, a person brings an action against a stockholder in an insolvent banking company to charge him as a partner, it is necessarily a part of his case to show that the defendant was a member of a partnership, and not of a corporation. He alleges that, and the burden is upon him to prove it.⁴⁰ But it does not follow from this that there is any general presumption that a particular body is or is not incorporated; or that, outside of the rule that a party affirming an issue must prove it, there is any burden of proof on the subject one way or the other.

⁴⁰ *Hallstead v. Coleman*, 143 Pa. St. 276; 24 Pitts. L. J. (N. S.) 135; 33 W. 352; s. c. 13 L. R. A. 370; *Gibbs's Estate*, 157 Pa. St. 59; s. c. 22 L. R. A. N. C. 120; 27 Atl. Rep. 383.

CHAPTER CCVII.

CONSOLIDATION OF CORPORATIONS.

Art. I. Power to Consolidate, §§ 8216-8228.

II. Consent of Stockholders and Creditors, §§ 8231-8236.

III. Effect of Consolidation, §§ 8238-8248.

IV. Other Matters Relating to Consolidation, §§ 8251-8257.

ARTICLE I. POWER TO CONSOLIDATE.

SECTION	SECTION
8216. Power to consolidate must be conferred by the State.	8223. One corporation not allowed to own and wreck another.
8217. Must be conferred upon all the constituent corporations.	8224. Power to consolidate by one company buying up the shares of the other.
8218. State has the right to determine the terms and conditions of consolidation.	8225. Consolidation of parallel and competing railway lines.
8219. State may withdraw power to consolidate before consolidation effected.	8226. What are parallel and competing lines.
8220. Statutes under which the power to consolidate is held to exist.	8227. Consolidation of connecting railway companies.
8221. Statutes which do not confer the power to consolidate.	8228. Consolidation of connecting railway companies of adjoining States.
8222. Statutory restraints upon consolidation.	

§ 8216. Power to Consolidate must be Conferred by the State.—

At the outset, it must be borne in mind that the power to consolidate does not exist unless conferred by the State.¹

¹ 1 Thomp. Corp., § 315; Greenville Compress &c. Co. v. Planters' Compress &c. Co., 70 Miss. 669; s. c. 35 Am. St. Rep. 681; 13 South. Rep. 879; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42; s. c. 72 Am. Dec. 685, and note. See extended note to McMahon v. Morrison, 79 Am. Dec. 420; Ameri-

can Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 651; Kavanagh v. Omaha Life Asso., 84 Fed. Rep. 295; Louisville &c. R. Co. v. Kentucky, 161 U. S. 677; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 14; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

§ 8217. Must be Conferred upon all the Constituent Corporations.—

Moreover, in order to a valid consolidation, the power so to consolidate must have been conferred upon *each* of the constituent corporations by the State under whose laws it exists.² For example, a provision in a charter of a railroad company, empowering it to consolidate with "any other railroad company," does not empower it to consolidate with a company whose charter contains no such provision.³ Nor does such a provision authorize a company formed by its consolidation with other railroad companies to consolidate with still another company, although the act authorizing their consolidation provides that all the rights, privileges, and franchises granted in the charter of any of the companies, shall inure to the consolidated company.⁴

§ 8218. State has the Right to Determine the Terms and Conditions of Consolidation.—Undoubtedly, the granting of corporate franchises by the State to individuals, is a benefaction which the State may accord or withhold at its mere pleasure. As it may withhold it entirely, it may annex such terms and conditions to it as it may see fit.⁵ This principle extends to the consolidations of corporations. No power to consolidate exists unless it has been conferred by the State. As the State may withhold the privilege entirely, it may annex such terms and conditions to it as it may see fit; and if the constituent companies, or any of them, find such terms and conditions too onerous for them to accept, they cannot consolidate at all. Moreover, it must be kept in mind that the power to consolidate must have been conferred upon each of the constituent corporations. It must follow that if the terms and conditions which the State has annexed to the privilege of consolidation by *any one* of the constituent companies are too onerous to

² St. Louis &c. R. Co. v. Terre Haute R. Co., 145 U. S. 393, 404; Louisville &c. R. Co. v. Kentucky, 161 U. S. 677; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

³ Morrill v. Smith County, 89 Tex. 529; s. c. 36 S. W. Rep. 56; rev'g-s. c. 33 S. W. Rep. 896.

⁴ Morrill v. Smith County, 89 Tex. 529; s. c. 36 S. W. Rep. 56; rev'g 33 S. W. Rep. 899.

⁵ Home Ins. Co. v. New York, 134 U. S. 594, 599; Paul v. Virginia, 8 Wall. (U. S.) 168, 181; Railroad Co. v. Maryland, 21 Wall. (U. S.) 456, 472; Louisville &c. R. Co. v. Kentucky, 161 U. S. 677, 702-703; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476. See also, in general affirmation of this principle, Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404; Ducat v. Chicago, 10 Wall. (U. S.) 410; California v. Pacific R. Co., 127 U. S. 1, 40.

be accepted, that will block the consolidation entirely. It follows that if several corporations, created under the laws of several different States, seek to consolidate, and the legislature of *one* of those States imposes an onerous condition upon the corporation created under the laws of that State, precedent to such consolidation,—such as the payment of a so-called “*consolidation tax*,”—that condition must be fulfilled, or there can be no such consolidation.⁶

§ 8219. **State may Withdraw Power to Consolidate before Consolidation Effected.**—It is an established exception to the rule in the Dartmouth College case,⁷ that so long as the grant of a franchise or privilege remains *in fieri*—*unexecuted*, and not merely *unaccepted*—the State is at liberty to recall it.⁸ Recent applications of this doctrine made by the Supreme Court of the United States are to the effect that, where the State has granted to corporations the power to consolidate, the grant may be withdrawn, at the pleasure of the legislature, at any time before a consolidation has actually taken place.⁹ Therefore, where parallel and competing railway companies possess, under their charters, the power to consolidate, the State may, in the exercise of its police power, prevent such a consolidation at any time before it has actually taken place, by a constitutional amendment or a statute prohibiting the consolidation of parallel and competing lines.¹⁰ From this it follows that a privilege conferred upon corporations by a general statute, of consolidating with each other, may be withdrawn by a repeal of the statute at any time before a consolidation has actually taken place under it; but this will not be so where the repealing statute contains a saving clause providing that such a repeal shall not affect or impair any act done or right *accruing*, accrued or acquired before the date named. In such a case, where a proceeding under the repealed statute to consolidate several corporations into one, was begun *three days* before the date named, but was not consummated, and had not yet received the requisite assent of the

⁶ Ashley v. Ryan, 153 U. S. 436; s. c. 38 L. ed. 773; 14 Sup. Ct. Rep. 865; aff'g s. c. 49 Oh. St. 504; s. c. 28 Ohio L. J. 41; 31 N. E. Rep. 721; 12 Ry. & Corp. L. J. 126; aff'g in turn 6 Ohio C. C. 208.

⁷ 4 Wheat. (U. S.) 518.

⁸ Pearsall v. Great Northern R. Co., 161 U. S. 646; s. c. 16 Sup. Ct. Rep.

705; 40 L. ed. 838; rev'g s. c. 73 Fed. Rep. 983.

⁹ Pearsall v. Great Northern R. Co., *supra*; Louisville & C. R. Co. v. Kentucky, 161 U. S. 677; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

¹⁰ Pearsall v. Great Northern R. Co., *supra*.

stockholders,—it was held that the corporations had the right to proceed with the consolidation as though the repealing statute had not been passed.¹¹

§ 8220. Statutes under which the Power to Consolidate is Held to Exist.—Under a statute providing for the consolidation of two corporations of the same nature and covering the same territory,¹² two water-works companies supplying water to the same district may be lawfully consolidated;¹³ and so may a gas company and an electric light company.¹⁴ Under a statute declaring that two or more mining, quarrying, or *manufacturing* companies may unite or consolidate,¹⁵ two or more electric light companies may consolidate.¹⁶ The Illinois statute¹⁷ authorizing the “purchase” by a railroad company owning and operating a railroad connecting at the *boundary line* of the State with a road in another State, or operating in connection with its own line any other railroad in the State or other States of such road, empowers such company to *consolidate* with the corporations of the other States.¹⁸ The provision of the Civil Code of California in relation to the incorporation of railroad companies¹⁹ applies equally to corporations formed and existing before and after the adoption of such Code;²⁰ and another provision of the same Act applies the same rule to the consolidation of all street railroad corporations.²¹

§ 8221. Statutes which do not Confer the Power to Consolidate.—Statutes which confer upon railroad companies a power to *connect*

¹¹ *Cameron v. New York &c. Water Co.*, 133 N. Y. 336; s. c. 31 N. E. Rep. 104; aff'd s. c. 62 Hun (N. Y.) 269; 16 N. Y. Supp. 757; 42 N. Y. St. Rep. 912.

¹² N. Y. Laws 1877, chap. 374 (since repealed).

¹³ *Cameron v. New York &c. Water Co.*, 16 N. Y. Supp. 757; s. c. 62 Hun (N. Y.) 269; 42 N. Y. St. Rep. 912; aff'd in 133 N. Y. 336; 31 N. E. Rep. 104.

¹⁴ *People v. Rice*, 138 N. Y. 151; s. c. 33 N. E. Rep. 846.

¹⁵ Ala. Code, 1886, § 1565.

¹⁶ *Beggs v. Edison Electric Illuminating &c. Co.*, 96 Ala. 295; s. c. 11 South. Rep. 381.

¹⁷ Ill. Act, June 30, 1885; 3 Starr & C. Ann. Stat. (Ill.) 2d ed., p. 3243, par. 36.

¹⁸ *Continental Trust Co. v. Toledo &c. R. Co.*, 82 Fed. Rep. 642. See also *post*, § 8228.

¹⁹ Cal. Civ. Code, § 473.

²⁰ *Ibid.*, § 510.

²¹ *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225. One railroad corporation may, under Ill. Acts June 30, 1885, and March 26, 1872, be consolidated with another under the name of the latter, which is continued in existence with enlarged powers, franchises, and property rights; and this consolidation may be brought about by a transfer of all the property, stock and franchises of the one corporation to the other: *Chicago &c. R. Co. v. Ashling*, 160 Ill. 373; s. c. 43 N. E. Rep. 373.

or *unite their roads* with each other do not confer upon them the power to consolidate their capital stock, properties and franchises so as to form a new corporation.²² A collection of statutes of Kentucky and Tennessee relating to the Louisville and Nashville Railroad Company, referred to in the opinion of the court in the case cited in the margin, were held to confer upon that corporation no general right to purchase other railroads or to consolidate with other railroad companies; and this, although one of these statutes contained the clause "and may purchase and hold any road constructed by another company." The court read this clause out of the statute under the rule *noscitur a sociis*.²³

§ 8222. **Statutory Restraints upon Consolidation.**—Upon a principle of construction elsewhere stated,²⁴ statutes granting the power to consolidate, and yet imposing restraints and conditions upon such consolidation, are to be strictly construed in favor of the State and against the corporation. They are not to be construed so as to give effect to the power and nullify the condition or prohibition, as was done in the case about to be considered. A statute of Illinois, enacted in 1872, provided for the consolidation of corporations, but with the proviso "that *no more than two* corporations *now existing* shall be consolidated into one, under the provisions hereof." With this statute under his eye, a Federal Circuit Judge held that *more than two* corporations might be consolidated, although but two of them were existing at the time of the passage of this statute, and gave the following sage reason for his decision: "I see no reason why these defendants,—since only two were, when the law of 1872 was enacted, "*then existing*,"—may not be consolidated."²⁵

§ 8223. **One Corporation not Allowed to Own and Wreck Another.**

—One corporation cannot, according to the best opinion, be a per-

²² *Post*, § 8227; *Louisville & C. R. Co. v. Kentucky*, 161 U. S. 677, 684; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

²³ *Louisville & C. R. Co. v. Kentucky*, *supra*; *State v. Vanderbilt*, 37 Oh. St. 590; *Elkins v. Camden & C. R. Co.*, 36 N. J. Eq. 5.

²⁴ *Post*, § 8298.

²⁵ *Barrows v. People's Gas Light & Co.*, 75 Fed. Rep. 794. The same learned and upright judge held that a mortgage bondholder of such a corporation has no standing in a court of equity to have such a consolidation enjoined, although it might operate to destroy the franchise to be a corporation, and extinguish easements which were included in the plaintiff's mortgage.

Ibid.

manent shareholder in another corporation, unless the right is given by statute.²⁶ Even where the right is given by statute, it must be exercised in good faith towards the minority stockholders. It does not extend so far as to allow the purchasing corporation, as a holder of a majority of the stock and bonds of the immolated company, so to manage its affairs as to cause a default of a mortgage, and then obtain control of its property by foreclosing the mortgage and causing the property to be sold at less than its value, to the injury of the minority stockholders. A decree of foreclosure which takes place under such circumstances will be reversed. The governing principle is that a corporation, owning a majority of the stock of another corporation, and assuming control of its business through the control of its officers and directors, assumes the same trust relation towards its minority stockholders that a corporation usually occupies towards its own stockholders. If, in such a case, the purchasing corporation assumes control of the affairs of the servient corporation, diverts the income accruing from its business, refuses business which would enable it to pay the interest on its bonded indebtedness, and then brings a proceeding in equity to foreclose such mortgage for the purpose of getting control of the property to the exclusion of the minority stockholders,—it will, where justice is honestly administered, fail in its nefarious attempt. If the corporation sues, under such circumstances, to foreclose the mortgage, evidence that it has so acted is admissible; and if the facts are established, they constitute a good defense.²⁷

§ 8224. Power to Consolidate by one Company Buying up the Shares of the Other.²⁸—It has been held that a *consolidation*, and not a mere *sale* and purchase, is effected where all the property and franchises of one corporation are transferred to another, and where the stockholders of the former corporation transfer all their shares therein to the latter company, under an arrangement by which the shares of the latter company are issued to them in exchange.²⁹ It seems that a general power to consolidate includes the power to consolidate in this way. Accordingly, it has been held that a *land*

²⁶ 1 Thomp. Corp., § 1102, *et seq.*; *post.*, § 8353.

²⁷ Farmers' Loan &c. Co. v. New York &c. Co., 150 N. Y. 410; s. c. 34 L. R. A. 76; 44 N. E. Rep. 1043; 54 Alb. L. J. 311.

²⁸ See 1 Thomp. Corp., § 314.

²⁹ Chicago &c. R. Co. v. Ashling, 160 Ill. 373; s. c. 43 N. E. Rep. 373; *aff'g* s. c. 56 Ill. App. 327.

company empowered to form a "temporary or permanent consolidation" with any *railroad company*, may purchase all the shares of stock of the railway company, and thereby control the same, if such control is in furtherance of its general powers.³⁰ A statute³¹ authorizing one railroad company, under circumstances named therein, "to purchase and hold, in fee simple or otherwise, and to use and enjoy the railway property, corporate rights and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders," etc., authorizes a consolidation; and such a purchase is a consolidation,³² and not a sale.³³ All this is compatible with the conclusion that the fact that one corporation owns the entire capital stock of another does not vest in the former the *legal title* to the property of the latter, or render the two corporations identical; but they continue to be separate legal entities. The fact of the sole ownership of the shares of a corporation is the same whether the owner be a natural person or another corporation.³⁴

³⁰ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582.

³¹ Illinois Act of June 30, 1885; 3 Starr & C. Ann. Stat. (Ill.) 2d. ed., p. 3243, par. 36.

³² *Continental Trust Co. v. Toledo & C. R. Co.*, 82 Fed. Rep. 642.

³³ *Chicago & C. R. Co. v. Ashling*, 160 Ill. 373; s. c. 43 N. E. Rep. 373; *aff'g* s. c. 56 Ill. App. 327. Compare *Rust v. United Water-Works Co.*, 17 O. C. A. (U. S.) 16, 23; s. c. 36 U. S. App. 167; 1 Am. & Eng. Corp. Cas. (N. S.) 678; 70 Fed. Rep. 129.

³⁴ *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1; s. c. 33 L. R. A. 800; 25 S. E. Rep. 326. See, as to the effect of the *sole ownership* of the shares of a corporation, 3 *Thomp. Corp.*, § 2946; with which compare 4 *Id.* 5096; *Van Allen v. Assessors*, 3 Wall. (U. S.) 573, 584; s. c. 18 L. ed. 229, 234; *The Queen v. Armand*, 9 Ad. & El. (N. S.) 806; *Button v. Hoffman*, 61 Wis. 20; s. c. 50 Am. Rep. 131; *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; 29 L. ed. 499; *Atchison & C. R. Co. v. Cochran*, 43 Kan. 225; s. c. 7 L. R. A. 414; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83; s. c. 19 L. R. A.

684, and note, wherein are cited *Newton Man. Co. v. White*, 42 Ga. 159; *Wilde v. Jenkins*, 4 Paige (N. Y.) 482; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *Baldwin v. Canfield*, 26 Minn. 43; *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812; *England v. Deerbourn*, 14 Mass. 590; *Swift v. Smith*, 65 Md. 428; s. c. 57 Am. Rep. 336; *Bellona Company's Case*, 3 Bland Ch. (Md.) 442, 446; *Winona & C. R. Co. v. St. Paul & C. R. Co.*, 23 Minn. 359; *Mathis v. Morgan*, 72 Ga. 517; *Evarts v. Killingworth Man. Co.*, 20 Conn. 447. That power given to a railroad company to consolidate with any other railroad corporation, includes the power to purchase a portion of the stock of another company by an agreement to guarantee the bonds of the latter company,—see *Pearsall v. Great Northern R. Co.*, 73 Fed. Rep. 933; *rev'd* on other grounds in 161 U. S. 646; s. c. 40 L. ed. 838; 16 Sup. Ct. Rep. 705. That a *notice* of a stockholders' meeting under the New York statute for the consolidation of a corporation with another, and proxies to be voted at such meeting, are not invalidated because, in designating the company, they state that it is of a town which has been annexed to a

§ 8225. Consolidation of Parallel and Competing Railway Lines.—

The consolidation of parallel and competing railroads is manifestly opposed to the public interest, and such consolidations are prohibited by many constitutions and statutes. Upon a principle of construction elsewhere referred to, no power to form such a consolidation can be held to exist unless it is granted in very distinct terms.³⁵ It was held that neither this power, nor the general power to acquire other railroads by purchase, was conferred by a collection of statutes authorizing a railroad company to purchase and acquire *branch roads*, although one of the statutes contained the words "and may purchase and hold any road constructed by any company."³⁶ A constitutional or statutory prohibition against the consolidation of parallel or competing lines cannot be evaded by going through the form of a judicial sale. A judicial sale does not confer on the purchaser any rights which he is forbidden by law to acquire at private sale or in any other way. "If, from reasons of public policy, the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful, because the parties choose to let it take the form of a judicial sale. A person who, by reason of any statutory disability, such as infancy, lunacy, marriage or otherwise, is incompetent to buy at private sale, is not the less incompetent from becoming the purchaser at a judicial sale. The prohibition is not upon the power of the court foreclosing the mortgage to order a judicial sale of the property, but upon its power to confirm a sale made to a parallel or competing road."³⁷ It is conceded that the stockholders, even of a parallel and competing railway, may purchase a railway property at a judicial sale and organize a new corporation, and this will be a separate corporation from the parallel and competing corporation, and will not be within the prohibition against the consolidation of parallel and competing lines.³⁸ This is an apt illustration of the evils which flow from that

city, instead of the city waif into which the town has been changed, where no stockholders were misled thereby,—*Langan v. Francklyn*, 20 N. Y. Supp. 404; s. c. 29 Abb. N. Cas. 102. That *articles of consolidation* of railroad corporations are not, in Nebraska, required to be recorded in the county clerk's office; but that a *duplicate* of the agreement must be filed with the Secretary of State: *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171; s. c.

49 N. W. Rep. 1110; 10 Rail. & Corp. L. J. 447.

³⁵ *Post*, § 8298.

³⁶ *Louisville & C. R. Co. v. Kentucky*, 161 U. S. 677; s. c. 40 L. ed., 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

³⁷ *Louisville & C. R. Co. v. Kentucky*, 161 U. S. 677, 693; s. c. 40 L. ed., 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476.

³⁸ *Louisville & C. R. Co. v. Kentucky*,

judicial stolidity which, for juridical purposes, regards a corporation as an unchangeable entity — something which you cannot see with your eyes, hear with your ears, snuff with your nose, taste with your tongue, nor pinch between your fingers,— and which persists in refusing to look at the individuals who compose it. When the same individuals *own* two corporations which operate parallel and competing railway lines, is not the policy of such a constitutional provision violated as much as it is when their capital stock, properties and franchises are consolidated so as to form one company? There are two properties under one collection of owners, and these owners are not going to compete with themselves. The power of a State to forbid one transportation company from purchasing or consolidating with a parallel or competing line has been before the courts in a large number of cases, in some of which, relating to interstate railways, it was said, *arguendo*, that such statutes infringed the exclusive power of Congress conferred over the regulation of interstate commerce.³⁹ Frequent decisions of the subordinate Federal courts affirm the same power.⁴⁰ Finally, it has been settled, by the only court whose decision can settle the question, that the power to prohibit the consolidation of parallel and competing lines of railway is within the police power of the State, and that this power may be exercised within wide limits of legislative discretion whenever its exercise will not trench upon rights already vested; and further that, although the power to consolidate may have been distinctly conferred, yet so long as it has not been acted upon and consolidations effected thereunder, it may be withdrawn at the will of the legislature;⁴¹ and this although there exists at the time no reserve of power in the State to alter, amend or repeal charters or acts of incorporation.⁴² Upon the question what unions or connections between railroad companies are within the meaning of prohibitions of this kind, it has been held in a judgment destined to acquire a great reputa-

161 U. S. 677, 693; s. c. 40 L. ed., 849; 16 Sup. Ct. Rep. 714. See also *Pearsall v. Great Northern R. Co.*, 161 U. S. 646.

³⁹ *Currier v. Concord Railroad*, 48 N. H. 321; *Gyger v. Railway Co.*, 136 Pa. St. 96; *Pennsylvania R. Co. v. Commonwealth*, (Pa.) 7 Atl. Rep. 368; *Texas & C. R. Co. v. Southern Pac. R. Co.*, 41 La. An. 970; *East Line & C. R. Co. v. Rushing*, 69 Tex. 306; *Gulf & C. R. Co. v. State*, 72 Tex. 404; *State v. Atchison & C. R. Co.*, 24 Neb. 143;

Hafer v. Cincinnati & C. R. Co., 29 Week. L. Bul. (Oh.) 68.

⁴⁰ *Langdon v. Branch*, 37 Fed. Rep. 449; *Hamilton v. Savannah & C. R. Co.*, 49 Fed. Rep. 412; *Clarke v. Central R. Co.*, 50 Fed. Rep. 338; *Kimball v. Atchison & C. R. Co.*, 46 Fed. Rep. 888.

⁴¹ *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *Louisville & C. R. Co. v. Kentucky*, *supra*.

⁴² *Louisville & C. R. Co. v. Kentucky*, *supra*.

tion that a statute prohibiting a railroad company from consolidating, leasing, or in any way becoming the owner of or controlling any other railroad corporation which owns a parallel or competing line, or any stock thereof, is violated by an agreement by one railroad company to purchase half the stock of a competing line, and to make a traffic arrangement with it, and to pay therefor by a guaranty of its bonds.⁴³ An arrangement by which a railroad company, in return for a guaranty of its bonds, turns over to a trustee for the entire body of stockholders of another company owning a parallel road, one-half of its stock, with an agreement contemplating an interchange of traffic and the use of terminal facilities, and with the probability that the complete control of the former will be obtained by the latter company,— is in violation of a statute prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, a parallel or competing line.⁴⁴

§ 8226. **What are Parallel and Competing Lines.**— Upon the question what railway lines fall within the designation of parallel or competing lines, within the meaning of such a constitutional or statutory provision, the observations of Mr. Justice Brown in giving the opinion of the Supreme Court of the United States in an important case, are very suggestive: “Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different *termini* and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo; but they could scarcely be called competing, since one is dependent upon the traffic of the Northwest, while Cincinnati is a southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but only in a limited sense competing; since they are between different *termini*, and each is required for the trade of its own section of the State. Even in

⁴³ *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; s. c. 16 Sup. Ct. Rep. 705; 40 L. ed. 838; rev'g s. c. 73 Fed. Rep. 933.

⁴⁴ *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; s. c. 16 Sup. Ct. Rep. 705; 40 L. ed. 838; rev'g s. c. 73 Fed. Rep. 933.

the present case the competition is mostly confined to the through traffic.”⁴⁵ So, it has been held that railroads which do not touch any two common points, having between them for more than forty miles another road, and one of which is in reality a suburban road, not more than one per cent of whose traffic would in any event pass over the other, are not competing lines within the meaning of a statute⁴⁶ prohibiting the consolidation of such lines, or the purchase, lease, or control of one such line by the other.⁴⁷

§ 8227. Consolidation of Connecting Railway Companies.—Speaking now without reference to consolidations between corporations created under the laws of different States,—in other words, without reference to interstate consolidations,⁴⁸ or to any interstate questions,—we may notice a distinction between consolidations between two or more corporations acting as common carriers, and joint traffic arrangements between them. And while none of the former kind can take place without the express authorization of the State, yet for an arrangement of the latter kind, it seems that no special power need be conferred, since it might justly be regarded as an arrangement by the associated carriers for the ordinary prosecution of the business of each of them. In a case in the Supreme Court of Illinois, it was said by Mr. Justice Bailey: “Without attempting to determine whether, as a general proposition, corporations may contract joint obligations, there can be no doubt, we think, of the power of two or more railway companies, whose railways formed a continuous line, to enter into a joint arrangement for operating their railways as one ‘line,’ and to become jointly liable for money borrowed to be used in furtherance of the business of such ‘line.’” And the court held that an action of *assumpsit* would lie against such a collection of railway companies jointly, to recover interest due on moneys so advanced to them.⁴⁹ It must also be kept in mind, on a principle of interpretation already stated,⁵⁰ that no power on the part of connecting railroad companies to consolidate their capital stock, properties and franchises so as to form one corporation exists unless it is granted by the legislature in distinct terms. Such a power is not included in a grant of power to a railroad corporation

⁴⁵ Louisville &c. R. Co. v. Kentucky, 161 U. S. 677, 698-699.

⁴⁶ Mo. Rev. Stat., § 2569.

⁴⁷ Kimball v. Atchison &c. R. Co., 46 Fed. Rep. 888.

⁴⁸ See *post*, § 8228.

⁴⁹ Chicago &c. R. Co. v. Ayers, 140 Ill. 644; s. c. 30 N. E. Rep. 687; aff'g s. c. 39 Ill. App. 607.

⁵⁰ *Ante*, § 8222.

to *unite* or *connect* its road with some other road. A power to connect or unite with another road refers merely to a *physical* connection of the tracks, and does not authorize the *purchase* or even the *lease* of such other road, or any union of the *franchises* of the two companies.⁵¹ Thus, a provision in the charter of a railroad company giving it the right to "connect itself" with any other railroad company and operate and maintain its railroad in "connection or consolidation" with such other company, authorizes merely a *traffic* consolidation, and not a *corporate* consolidation.⁵² Statutes existing in many States provide for consolidations of railroad companies with domestic corporations owning railroads in other States connecting with domestic railroads at the interstate boundary line.⁵³ A Federal Court had occasion to consider whether three railroad companies formed respectively under the laws of Ohio, Indiana and Illinois, could enter into a valid consolidation by contemporaneous acts, so as to make a valid corporation in the face of the following statute of Ohio: "A company organized in this State for the purpose of constructing, owning, and operating a line of railway, or whose line of road is made or in process of construction, to the *boundary line* of the State, or to any point either in or out of the State, may consolidate its capital stock with the capital stock of any company in an adjoining State, organized for a like purpose and whose line of road has been projected, constructed, or is in process of construction to the same point where the several roads, so united and constructed, will form a continuous line for the passage of cars."⁵⁴ It was objected that, although under this statute an Ohio corporation might be consolidated with an Indiana corporation, yet it did not permit an Ohio corporation to consolidate with an Indiana and an Illinois corporation, because Illinois did not adjoin Ohio. But judicial complacency glided easily over this objection. The court made Ohio and Illinois join by the following simple process of reasoning: "It cannot be denied, however, that, under the Illinois statute, the Illinois and Indiana corporations might have

⁵¹ Louisville &c. R. Co. v. Kentucky, 161 U. S. 677; s. c. 40 L. ed., 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476. See also Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667; Pennsylvania Co. v. St. Louis &c. R. Co., 118 U. S. 290; Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1; St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S.

393; Commissioners v. Lafayette &c. R. Co., 50 Ind. 85, 110.

⁵² Morrill v. Smith County, 89 Tex. 529, 553; s. c. 36 S. W. Rep. 56; rev'g s. c. 33 S. W. Rep. 899.

⁵³ See Ill. Act of June 30, 1885, recited and construed in Chicago &c. R. Co. v. Ashling, 160 Ill. 373; s. c. 43 N. E. Rep. 373. See *post*, § 8247.

⁵⁴ Rev. Stats. Ohio, § 3380.

united, and that then the consolidated corporation, being a corporation of Indiana, could be consolidated with the Ohio corporation; and we should have had just what the corporation under consideration purports to be, to-wit, a legally consolidated corporation of Ohio, Indiana, and Illinois. It is obvious that, if such a corporation could have been legally formed, the mere mistake in the mode by which the union was brought about (if it was a mistake, which I do not decide), does not prevent the corporation from being a *de facto* corporation, under the principles stated at length above.”⁵⁵ Under this cheerful interpretation of the Ohio statute, a *de facto* consolidation might take place among a succession of corporations extending from Ohio to the Pacific ocean, chartered respectively by Ohio, Indiana, Illinois, Missouri, Kansas, Colorado, Utah, Nevada, and California; since these would thus be made corporations “in an adjoining State;” and all this in the face of the rule that grants of franchises and privileges to corporations are strictly construed. Prior to the statutes about to be named, railroad corporations organized under the laws of Illinois had no authority, unless granted by their respective special charters, to consolidate with railroad companies of other States, but the then prevailing legislative policy was opposed to such consolidations. This policy was changed, and such consolidations authorized, by statutes passed, respectively, in 1883 and 1885.⁵⁶ Prior to the passage of the former of these statutes, no such consolidation could lawfully take place; nor would such an attempted consolidation create even a corporation *de facto*; nor would the passage of these statutes validate such an attempted consolidation, since the statutes were not retroactive.⁵⁷

§ 8228. Consolidation of Connecting Railway Companies of Adjoining States.— On a principle already stated,⁵⁸ in order to justify the consolidation of connecting railway companies of adjoining States, a power to consolidate must be found in the statute law governing *each* of the constituent corporations.⁵⁹

⁵⁵ Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. Rep. 642, 653.

⁵⁶ Ill. Act June 16, 1883; Laws 1883, p. 124; and June 30, 1885; Laws 1885, p. 229.

⁵⁷ American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641; s. c.

28 Chicago Leg. News, 99; 42 N. E. Rep. 153.

⁵⁸ § 8217.

⁵⁹ American Loan &c. Co. v. Minnesota &c. Co., 157 Ill. 641; s. c. 42 N. E. Rep. 153; Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. Rep. 642 (doctrine recognized).

ARTICLE II. CONSENT OF STOCKHOLDERS AND CREDITORS.

SECTION	SECTION
8231. Consent of what number of shareholders necessary.	8234. Appraisement or arbitration as to the value of the shares of dissenting shareholders.
8232. Consent of stockholders, how procured.	8235. Consent of creditors not necessary.
8233. Consent of stockholders, how manifested.	8236. Consent of mortgage bondholders not necessary.

§ 8231. Consent of What Number of Shareholders Necessary.—

A man cannot be forced to become a member of a corporation without his consent.⁶⁰ It follows that, unless the statute law existing at the time when the corporation is formed, or the constating instrument by which such corporation is formed, otherwise provides, one corporation cannot be consolidated with another without the *unanimous consent* of its stockholders.⁶¹ It follows that, in order to effect a consolidation in a given case, it may become necessary to buy off a dissenting stockholder. But this must be done openly, if at all. It has been held that nothing less than the unanimous consent of the stockholders of a consolidated corporation can justify the withdrawal of its funds to pay a stockholder for the surrender of his shares in one of the constituent corporations in addition to the consideration contemplated by the consolidation agreement between the constituent corporations, secretly agreed upon between him and a promoter of the consolidation, who is an officer of the consolidated corporation.⁶² If the constitutional or statutory law existing when a corporation is originally formed, authorizes corporations of the kind to consolidate with others with the consent of the prescribed majority of the stockholders less than all, then such constitutional or statutory provision reads itself into the original compact formed among the stockholders, and a consolidation may be had without unanimous consent, but with the consent of the majority so prescribed. Nor is it a sound proposition, as was held by one court, that, under a reserved power to alter or repeal, from time to time, all laws concerning corporations, the legislature may, by a statute

⁶⁰ 1 Thomp. Corp., § 71; Id., § 272. ⁶² Trenton Pass. R. Co. v. Wilson, 55 N. J. Eq., 273; s. c. 37 Atl. Rep. 476.
⁶¹ Post, § 8269; Earle v. Seattle & C. R. Co., 56 Fed. Rep. 909; Louisville & C. R. Co. v. Howard, (Ky. Super. Ct.) 15 Ky. L. Rep. 25.

passed after a corporation has been formed, provide that it may be consolidated with another like corporation upon the consent of less than a majority of its stockholders;⁶³ for even this power of amendment does not authorize the legislature to take the property of A. invested in one corporation, and invest it in another corporation without his consent. This would be, in supposable cases, tantamount to taking one man's property away from him and giving it to another man. It would be a taking of private property for a private use, and without due process of law. It would, according to one conception, transcend the power of legislation in free government.⁶⁴ The Supreme Judicial Court of Massachusetts takes the view that, where there has been reserved to the legislature the power to alter, amend or repeal a charter at its pleasure, a shareholder may be forced into a consolidation against his consent by a statute enacted subsequently to the time when he became a shareholder, since he is deemed to have purchased his shares subject to this liability of alteration.⁶⁵

§ 8232. **Consent of Stockholders, how Procured.**—A consolidated corporation is not bound by a secret contract between the members of one of the constituent corporations for the payment of a consideration for the surrender of stock of another constituent corporation, purchased by one of them for the purposes of the consolidation, in addition to the consideration contemplated by the agreement of or consolidation between the constituent corporations.⁶⁶

⁶³ In the case alluded to, it was held that the legislature of California might authorize the consolidation of existing corporations with the consent of less than the whole number of stockholders of the constituent corporations; since Cal. Const. 1897, art. 12, § 1, provides that all laws concerning corporations may be altered from time to time, or be repealed: *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

⁶⁴ *Loan Asso. v. Topeka*, 20 Wall. (U. S.) 656; *Sinking Fund Cases*, 99 U. S. 700.

⁶⁵ *Hale v. Cheshire R. Co.*, 161 Mass. 443; s. c. 37 N. E. Rep. 307. All that the court held was that holders of the *common stock* of a railroad company, the charter of which is subject to repeal or amendment, who do not object at the time to a plan for the consoli-

dation of that and another railway company authorized by a statute enacted subsequently to their purchase of their shares, and approved by a majority in interest of the stockholders, whereby the holders of *preferred stock* receive a greater proportion of the new stock than the holders of the common stock, cannot maintain an action for an *accounting* on the ground that they are not bound by the terms of the consolidation, and are entitled to receive the same as the preferred shareholders: *Hale v. Cheshire R. Co.*, *supra*.

⁶⁶ *Trenton Pass. R. Co. v. Wilson*, 55 N. J. Eq. 273; 37 Atl. Rep. 476. Possibly the ingenious reader can untangle something out of the scheme of fraud disclosed by a case where it is held that a director of a consolidated corporation is not entitled, as a con-

§ 8233. **Consent of Stockholders, how Manifested.**— Unquestionably, the only proper and legal method of obtaining the consent of stockholders is by their votes at a meeting of stockholders regularly convened upon due notice, where the proceedings are openly conducted, and where each stockholder has an opportunity of consulting with his associates; and not by passing a subscription paper from one stockholder to another, telling one lie to one and another lie to another to gain his consent, and making each one believe that he is the only stockholder holding out contrary to the common interest.⁶⁷ Upon the question what shares may be voted at such a meeting, it has been held that mere *potential shares*, that is, shares which have not been issued, are not to be considered in determining majorities under a statute⁶⁸ providing, in effect, that two or more railroad or street railroad corporations may consolidate with the written consent of the holders of three-fourths in value of the stock of such corporations.⁶⁹ The consent of the stockholders may be manifested by a *ratification*, provided it takes place with knowledge and under fair conditions, as well as by a precedent authorization; and, on a principle elsewhere discussed,⁷⁰ this ratification may be found in the action of the stockholders.⁷¹ Upon the question who are entitled to vote at a stockholders' meeting called to vote on the question of consolidation, the general rule prevails as at other corporate elections,⁷² that those shareholders are entitled to vote whose names

dition of restoring money illegally withdrawn from it, to reimburse himself for advances in purchasing stock of a constituent corporation, by an issue of a corresponding amount of stock of the consolidated corporation, where he procured the stock of the constituent corporation to be assigned to a third person, who surrendered it to the consolidated corporation, in consideration of an issue of stock of the latter corporation to himself: *Trenton Pass. R. Co. v. Wilson*, 55 N. J. Eq. 273; s. c. 37 Atl. Rep. 476.

⁶⁷ See, however, *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

⁶⁸ Cal. Civ. Code, §§ 473, 510.

⁶⁹ *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225. There is a weak and unsound decision to the effect that, in a suit by a stockholder to enjoin an attempted consolidation, the court cannot go behind the record of stockholders upon the stock

book of the corporation to determine the real ownership of the shares, for the purpose of determining the right of the holders to vote, or their eligibility as directors: *Langan v. Francklyn*, 20 N. Y. Supp. 404; s. c. 29 Abb. N. Cas. 102.

⁷⁰ 4 Thomp. Corp., § 5314, *et seq.*; *post*, § 8437.

⁷¹ It was held in one case that the validity of the consolidation of street railway corporations, under the California Civil Code, cannot be assailed on the ground that one of the constituent corporations was not subject to the provisions of the Code under which the proceedings were taken, where its stockholders, by subsequent action, have ratified and adopted all the proceedings relating thereto, and it has conveyed all its property to the new corporation: *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

⁷² 1 Thomp. Corp., § 730.

rightfully appear on the books as such, without regard to the *equities* in favor of other persons under which they may hold their shares.⁷³

§ 8234. **Appraisement or Arbitration as to the Value of the Shares of Dissenting Shareholders.**—There are statutes providing that the value of the shares of dissenting shareholders may be ascertained by appraisement or arbitration, and purchased at the full value so ascertained.⁷⁴ In the consolidation of railway companies under the statutes of Ohio, a stockholder who refuses to convert his shares into the shares of the consolidated company may, by statute,⁷⁵ compel a submission of the question of the value of his shares to three disinterested men, to be appointed by the judge of the court of Common Pleas of the proper county; and an agreement to arbitrate between him and the company is not required. The failure to make a demand before the proposed consolidated company acquires the status of an incorporated company under the laws of that State, by filing a copy of the ratified agreement of consolidation with the Secretary of State, or a failure to make an attempt to agree with the company as to the value of his shares, does not defeat the right of the dissenting shareholder to have the full value of his shares paid to him; but it is the duty of the company proposing to consolidate to ascertain who, if any, of its stockholders refuse to convert their shares, and to cause the value of the shares of any who refuse, to be ascertained and paid “before the consolidation takes effect.”⁷⁶

§ 8235. **Consent of Creditors not Necessary.**—The consent of the creditors of the constituent corporations is not necessary to the

⁷³ In California the validity of the consolidation of railroad or street railroad corporations under Cal. Civ. Code, §§ 473, 510, cannot be questioned upon the ground that some of the stock voted in favor of the consolidation was voted by *trustees* as the legal owners: *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

⁷⁴ 1 Thomp. Corp., § 345.

⁷⁵ Ohio Act April 4, 1890; 87 Oh. Laws, 159.

⁷⁶ *Railway Co. v. Garrett*, 50 Oh. St. 405; s. c. 30 Ohio L. J. 14; 34 N.

El. Rep. 493. That the remedy given a stockholder in a corporation, proposed to be consolidated with another, under N. Y. Laws 1890, chap. 567, § 14, of having his stock appraised and receiving its value, is not exclusive, but he may resort to the courts in the exercise of their regular, usual, and ordinary equitable powers,—see *Langan v. Francklyn*, 29 Abb. N. Cas. (N. Y.) 102; s. c. 20 N. Y. Supp. 404.

⁷⁷ *Friedenwald v. Asheville Tobacco Works*, 117 N. C. 544; s. c. 23 S. E. Rep. 490.

validity of the consolidation, since their rights continue against the new corporation and its property the same as against the old.⁷⁷

§ 8236. Consent of Mortgage Bondholders not Necessary.—

It seems that the holders of bonds secured by a mortgage upon the net *income* of a railway have no right to object to a consolidation of the railway with another, so as to form a connecting line, provided the consolidation will not confuse the data by which the net earnings of the respective roads are determined.⁷⁸ Mortgage bondholders have no right to vote on the question of consolidation, unless the right has been conferred upon them in some way which is not open to question. A power given them to vote at elections of directors does not authorize them to vote upon the question of effecting a consolidation with another corporation.⁷⁹

ARTICLE III. EFFECT OF CONSOLIDATION.

SECTION.	SECTION
8238. Whether a consolidation creates a new corporation.	8244. Acceptance by creditors of the new corporation as their debtor.
8239. Whether consolidation works a dissolution of the constituent companies.	8245. Effect of consolidation of domestic with foreign corporation.
8240. To what rights of the old corporations the new one succeeds.	8246. Status of a corporation created by the joint action of two States.
8241. Consolidated corporation liable for the debts, obligations and torts of the constituent corporations.	8247. Effect of consolidation of connecting railway corporations created under the laws of different States.
8242. Construction of statutes which so provide.	8248. Effect of interstate consolidations upon Federal jurisdiction.
8243. Rights of creditors not impaired by agreements between the combining companies.	

§ 8238. Whether a Consolidation Creates a New Corporation.—

This question must be answered upon a consideration of the terms of the statute under which the consolidation takes place. For most purposes, a complete consolidation of the capital stock, franchises,

⁷⁸ *Hart v. Ogdensburg &c. R. Co.*, 69 *Hun* (N. Y.) 378; s. c. 52 N. Y. St. Rep. 799; 23 N. Y. Supp. 639. ⁷⁹ *Hart v. Ogdensburg &c. R. Co.*, *supra*.

and properties of two or more corporations creates a new corporation, but not for all purposes.⁸⁰ For example, rights of action against the constituent corporations survive against the new corporation.⁸¹ Such a consolidation creates a new corporation in the sense that a provision in the charter of one or more of the constituent companies granting an *exemption from taxation*, did not pass to the new corporation.⁸² So, a corporation may be formed by the consolidation of several street railroad corporations under the Civil Code of California,⁸³ and consequently may be organized for a term of fifty years, irrespective of the terms of the constituent corporations.⁸⁴ The general rule that the consolidation of two or more corporations into one creates a new company in such a sense as to work a dissolution of the original corporations forming the consolidated company, is said to be subject to exceptions, and to depend upon the statute under which the consolidation is effected. One corporation may absorb another, so to speak, by purchasing, under a statutory power, all the shares, franchises and properties of the other, and this may have the effect of absorbing only the selling corporation without creating a new corporation, but merely continuing the purchasing corporation in existence with an enlarged capital, and possibly with enlarged franchises.⁸⁵

§ 8239. Whether Consolidation Works a Dissolution of the Constituent Companies.—Whether the consolidation of two corporations works a dissolution of the constituent corporations is said to depend upon the terms of the statute under which the consolidation takes place.⁸⁶ One corporation may absorb another by purchasing all its assets, stock and franchises, issuing its own shares to the shareholders of the absorbed corporation, in which case the purchasing corporation will not be absorbed, but will continue in existence, with enlarged powers, franchises and property rights.⁸⁷

⁸⁰ See the reasoning in *State v. Baltimore &c. R. Co.*, 77 Md. 489; s. c. 26 Atl. Rep. 865.

⁸¹ 1 *Thomp. Corp.*, § 365.

⁸² *Keokuk &c. R. Co. v. Missouri*, 152 U. S. 301; s. c. 38 L. ed. 450; 14 Sup. Ct. Rep. 592.

⁸³ Cal. Civ. Code, §§ 473, 510.

⁸⁴ *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

⁸⁵ *Chicago &c. R. Co. v. Ashling*, 160 Ill. 373; s. a. 43 N. E. Rep. 373.

Compare *Hart v. Ogdensburg &c. R. Co.*, 69 Hun (N. Y.) 378; s. c. 52 N. Y. St. Rep. 799; 23 N. Y. Supp. 639; *People v. Louisville &c. R. Co.*, 120 Ill. 48; *Ohio &c. R. Co. v. People*, 123 Ill. 467.

⁸⁶ *Chicago &c. R. Co. v. Ashling*, 160 Ill. 373, 382; s. c. 43 N. E. Rep. 373; aff'g s. c. 56 Ill. App. 329; *Central R. &c. Co. v. Georgia*, 92 U. S. 665.

⁸⁷ *Chicago &c. R. Co. v. Ashling*,

§ 8240. **To what Rights of the Old Corporations the New One Succeeds.**—The new corporation succeeds to the powers, franchises and privileges of the old corporation, except those which, on grounds of public policy or otherwise, are not vendible, such as exemptions from taxation; and statutes authorizing consolidations generally so provide in express terms.⁸⁸ For example, the right of a street railway corporation, conferred upon it by statute, to occupy a street of a city with its tracks upon obtaining the consent of the city, passes to a consolidated company formed under another statute, which provides that the consolidated company shall have all the franchises, and be subject to all the duties and obligations, imposed upon the companies consolidating, or either of them.⁸⁹ So, it has been held by a learned Federal judge that where several street railway companies enjoy, under irrevocable charters, the right to occupy with their tracks any or all of the streets of a certain city, but a constitutional provision is subsequently adopted providing for the organization of corporations and subjecting them to alteration or repeal, and subsequently statutes are enacted providing for the consolidation of corporations, under which these companies are consolidated,—their franchises of occupying the streets of the city are not, by the mere fact of becoming consolidated, subjected to the legislative will and to legislative abrogation.⁹⁰ A consolidated corporation cannot, by virtue of the consolidation, maintain an action on a promissory note, given after consolidation, to one of the constituent corporations, where the articles of consolidation provide that the constituent companies shall continue in existence for the purpose of settling their liabilities, and there is no showing that the consideration for the note moved from the consolidated corporation.⁹¹ As elsewhere stated, one corporation does not, by acquiring a majority of the shares of another corporation, acquire the right to do what it pleases with its own, to the disregard of the rights of

supra; distinguishing *People v. Louisville & C. R. Co.*, 120 Ill. 48, and *Ohio & C. R. Co. v. People*, 123 Ill. 467.

⁸⁸ Compare 1 Thomp. Corp., § 368.

⁸⁹ *Africa v. Knoxville*, 70 Fed. Rep. 729.

⁹⁰ *Citizens' Street R. Co. v. Memphis*, 53 Fed. Rep. 715.

⁹¹ *Union P. R. Co. v. Gochenour*, 56 Kan. 543; s. c. 3 Am. & Eng. R. Cas. (N. S.) 288; 43 Pac. Rep. 1135. It is scarcely necessary to appeal to judicial authority for the proposition that, in

the absence of fraud entitling it to a rescission as against the purchaser hereafter named, a corporation formed by the consolidation of two other corporations has no title to its stock issued to one of the old companies as a consideration for the transfer of its property, as against a third person to whom it has been transferred by the old company: *American Water-Works Co. v. Venner*, 45 N. Y. St. Rep. 441; s. c. 18 N. Y. Supp. 379.

minority stockholders. It cannot, by purchasing a majority of the shares of a competing corporation, and by thus obtaining control of its affairs, divert the income of its business, refuse business which would enable the competing company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining the entire control of its property to the injury of the minority stockholders; and in this nefarious business, expect the aid of a court calling itself a court of equity.⁹²

§ 8241. Consolidated Corporation Liable for the Debts, Obligations and Torts of the Constituent Corporations.—As already seen,⁹³ the consolidation of two or more corporations is like the uniting of two or more rivers; neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist though in a different form. So it is with a consolidated corporation. A new corporation is formed, but not in the sense which works a destruction of the rights of action existing against the old one. Independently of statute, the better view is that the new one is liable for any debts, obligations, or rights of action of any kind existing in favor of third persons at the time of the consolidation, and may be sued, at law ~~or~~ in equity, to enforce such rights and obligations without any agreement to become so answerable, and without any statute imposing the liability. The consolidated corporation is answerable in a direct action for the *torts*,⁹⁴ or the *contracts*⁹⁵ of the constituent corporations; may be compelled specifically to perform their contracts;⁹⁶ may be compelled to perform a public obligation imposed by charter or statute upon one of them, such as, in case of a street railway company, to pay the cost of paving and repaving the portion of the street occupied by its track.⁹⁷ In short, an obligation imposed by charter or

⁹² Farmers' Loan & Co. v. New York & C. R. Co., 150 N. Y. 410; s. c. 34 L. R. A. 76; 54 Alb. L. J. 311; 44 N. E. Rep. 1043.

⁹³ 1 Thomp. Corp., § 400.

⁹⁴ Cleveland & C. R. Co. v. Prewitt, 134 Ind. 557; s. c. 54 Am. & Eng. R. Cas. 198; 33 N. E. Rep. 367; Cashman v. Brownlee, 128 Ind. 266; Louisville & C. R. Co. v. Boney, 117 Ind. 501; s. c. 3 L. R. A. 435; Southern R. Co. v. Bouknight, 30 L. R. A. 823; s. c. 25 U. S. App. 415; 17 C. C. A. 181; 70 Fed. Rep. 442; Berry v. Kansas City & C. R. Co., 52 Kan. 774; s. c.

36 Pac. Rep. 724; rehearing denied in 52 Kan. 759, and 34 Pac. Rep. 805; State v. Baltimore & C. R. Co., 77 Md. 489; s. c. 26 Atl. Rep. 865.

⁹⁵ Friedenwald v. Asheville Tobacco Works, 117 N. C. 544; s. c. 23 S. E. Rep. 490. Compare Smith v. Los Angeles & C. R. Co., 98 Cal. 210; s. c. 33 Pac. Rep. 53.

⁹⁶ Cumberland Valley R. Co. v. Gettysburg & C. R. Co., 177 Pa. St. 519; 39 W. N. C. (Pa.) 72; 35 Atl. Rep. 952.

⁹⁷ Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444; s. c. 28 W.

statute upon one of the constituent companies, reads itself into the charter of the consolidated company and becomes a part of its being.⁹⁸

§ 8242. **Construction of Statutes which so Provide.**— But it is believed that most of the statutes which authorize consolidations expressly provide that all rights of action existing against the constituent companies at the time of the consolidation shall survive against the new corporation thereby formed. Where the statute contains this saving clause, and a person recovers a judgment at law against a corporation whose assets, franchises, stock, etc., have been acquired by another corporation, by a purchase and an issuing of its own shares in payment, the judgment creditor may maintain an action of *debt* upon his judgment against the purchasing corporation,— the transaction being a consolidation, and not a mere sale and purchase of assets.⁹⁹ The statutory right of a *creditor*¹⁰⁰ of one of the constituent corporations, or of a person damaged by a *tort*¹⁰¹ of one of them, to enforce his demand against the consolidated corporation, is not impaired by the fact that he has recovered a *judgment* for his demand against the constituent corporation, on any theory of merger or otherwise. The question as to whether the taking of *renewal notes* from a constituent corporation after the consolidation, was in *payment* of the original notes so as to discharge the obligation imposed on the consolidated corporation by statute to answer for the debts of the constituent corporations,¹⁰² is to be answered by ascertaining the intention of the parties, as manifested by the facts and circumstances attending their transactions; and the acceptance of the renewal notes will not operate as a discharge, if it was the intention of all parties merely to extend the time of payment of the original notes.¹⁰³ A corporation formed by consolidation of two others is bound by the terms of a *warranty deed* given by one of the others, under a statute which provides that all the debts, liabilities,

N. C. (Pa.) 388; 48 Phila. Leg. Int. 414; 22 Atl. Rep. 695.

⁹⁸ Philadelphia v. Ridge Ave. Pass. R. Co., *supra*.

⁹⁹ Chicago &c. R. Co. v. Ashling, 160 Ill. 373; s. c. 43 N. E. Rep. 373.

¹⁰⁰ Re Utica Nat. Brew. Co., 154 N. Y. 268; s. c. 48 N. E. Rep. 521; 7 Am. & Eng. Corp. Cas. (N. S.) 666; aff'g s. c. 19 App. Div. (N. Y.) 627.

¹⁰¹ Chicago &c. R. Co. v. Ashling,

160 Ill. 373; s. c. 43 N. E. Rep. 373. ¹⁰² N. Y. Laws 1892, chap. 691.

¹⁰³ Re Utica Nat. Brew. Co., 154 N. Y. 268; s. c. 7 Am. & Eng. Corp. Cas. (N. S.) 666; 48 N. E. Rep. 521; aff'g s. c. 19 App. Div. (N. Y.) 627. As to renewing debts out of existence under theories which have satisfied the judicial conscience of that State, see 3 Thomp. Corp., §§ 3117, 4196.

and duties of either company shall attach to it.¹⁰⁴ We have seen that where there is no statute authorizing a consolidation, an attempt to consolidate does not even create a corporation *de facto*.¹⁰⁵ It follows that the body thus attempted to be formed does not become liable for the debts of one of the constituent corporations. Nor does a statute¹⁰⁶ which provides that, in the case of a consolidation of corporations, the consolidated corporation shall be liable for the debts of the original owners, help such a case; because it does not itself authorize consolidations, but only applies to cases where consolidations have taken place under statutory authorization.¹⁰⁷

§ 8243. **Rights of Creditors not Impaired by Agreements between the Combining Companies.**— Whether the liability of the combining companies to make good the obligations of the constituent companies is deemed to arise under the principles of the common law, or by statute, it is not competent for the combining companies to impair that liability by any agreements which they may make among themselves, in the compact of consolidation or otherwise, to which the creditors do not consent.¹⁰⁸

§ 8244. **Acceptance by Creditors of the New Corporation as Their Debtor.**— It has been reasoned that, whilst an agreement by a corporation which purchases the property and franchises of another to assume the debts of the latter, does not bind its creditors, or relieve either of the consolidating companies from their liability, yet the creditors may accept the new corporation as their debtor if they see fit, and such acceptance is evidenced by the act of a creditor in bringing an action against the new company for a debt of the old.¹⁰⁹

§ 8245. **Effect of Consolidation of Domestic with Foreign Corporation.**— The mere sale by a domestic corporation of all its property to a foreign corporation, and a subsequent registration of the pur-

¹⁰⁴ *Deer Lake Co. v. Michigan Land &c. Co.*, 89 Mich. 180; s. c. 50 N. W. Rep. 807.

¹⁰⁵ *Ante*, § 8227; compare *ante*, § 8209.

¹⁰⁶ Here, Rev. Stat. Ill. 1897, chap. 32, § 65.

¹⁰⁷ *Kavanagh v. Omaha Life Asso.*, 84 Fed. Rep. 295.

¹⁰⁸ *Smith v. Los Angeles &c. R. Co.*,

98 Cal. 210; s. c. 33 Pac. Rep. 53; *State v. Baltimore &c. R. Co.*, 77 Md. 489; s. c. 26 Atl. Rep. 865; *Re Utica Nat. Brew. Co.*, 154 N. Y. 268; s. c. 48 N. E. Rep. 521; 7 Am. & Eng. Corp. Cas. (N. S.) 666; aff'g s. c. 19 App. Div. (N. Y.) 627.

¹⁰⁹ *Smith v. Los Angeles &c. R. Co.*, 98 Cal. 210; s. c. 33 Pac. Rep. 53.

chasing company in the domestic State as a foreign corporation doing business therein, does not make the purchasing corporation a domestic corporation of that State, under a statute which provides, in substance, that in case of a consolidation of a domestic with a foreign corporation, the corporation so formed shall be a domestic corporation.¹¹⁰

§ 8246. *Status of a Corporation Created by the Joint Action of Two States.*¹¹¹—The subject, so far as it relates to Federal jurisdiction as depending upon diverse State citizenship, was reviewed in 1895 by the United States Circuit Court of Appeals for the Eighth Circuit in a learned opinion by Mr. Circuit Judge Thayer, with the conclusion that two States cannot, by joint action, create a corporation which should be regarded as a single corporate entity; but that the result of the creation by one State of a corporation of a given name, and of a declaration by the legislature of an adjoining State that the same legal entity shall be or become a corporation of that State, and shall be entitled to exercise within its borders all of its corporate functions by the same board of directors, is not to create a single corporation, but two corporations of the same name having a different paternity; and finally, that an interstate corporation, so-called, formed by consolidation or otherwise, acts in each of the States as a domestic, and not as a foreign corporation.¹¹² One State may re-create, so to speak, a corporation formed and existing under the laws of another State as a domestic corporation of the former; and this may be done, too, without any specific provision for the stock or internal government of the new corporation.¹¹³ Upon this subject, in giving the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, Mr. Circuit Judge Lurton said: "We see no reason why the ordinary constituency of a corporation, such as shareholders, directors and officers, may not be dispensed with, by a legislature untrammelled by constitutional restrictions, by the substitution of another entity, fictitious though it may be, as the necessary constituency of the new corpo-

¹¹⁰ *Rust v. United Water-Works Co.*, 70 Fed. Rep. 128; s. c. 17 C. C. A. 16; 36 U. S. App. 167; 1 Am. & Eng. Corp. Cas. (N. S.) 678.

¹¹¹ 1 *Thomp. Corp.*, § 319, *et seq.*; 6 *Thomp. Corp.*, § 7981.

¹¹² *Missouri P. R. Co. v. Meeh.* 69 Fed. Rep. 753; s. c. 30 L. R. A. 250;

32 U. S. App. 691; 16 C. C. A. 510; 12 Am. R. & Corp. Rep. 218.

¹¹³ *Western & C. R. Co. v. Roberson*, 61 Fed. Rep. 592; s. c. 22 U. S. App. 187; 9 C. C. A. 646; *Louisville Trust Co. v. Louisville & C. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

ration. The shareholders in the old corporation become, for the purpose of the new creation, shareholders in the new. The directors and officers of the old entity become, for the formal purposes of the new creation and its operation, the directors and officers of the new organization. This identity of ultimate constituency does not necessarily operate to defeat the legislative purpose to create a new corporation. The old organization, *quoad hoc*, is the new corporation. Yet for the purposes of the new, as to its contracts, obligations, liabilities and property, there is no such blending of the two as to make them, in contemplation of law, identical."¹¹⁴ Under this convenient doctrine, a new Kentucky corporation was held to have been created out of an old Indiana corporation by the following act, passed by the legislature of Kentucky: "The Louisville, New Albany and Chicago Railway Company, a corporation organized under the laws of the State of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, and to have and use a common seal, with the power incident to corporations and authority to operate a railroad;" and by other sections adding other powers to the corporation thus created, but without any substantial provision for a capital stock.¹¹⁵ After the Indiana corporation had thus been made a corporation of Kentucky, it (the Indiana corporation) consolidated its capital stock, property and franchises with an Illinois corporation. It was held that the corporate existence of the Kentucky corporation was not thereby affected, especially as the new consolidated corporation had been recognized by the legislature of Kentucky.¹¹⁶

§ 8247. **Effect of Consolidation of Connecting Railway Corporations Created under the Laws of Different States.**— This subject has been considered in some of its phases in the preceding sections.¹¹⁷ The effect of such a consolidation is to make a *domestic* corporation in each of the States under whose laws either of the constituent corporations was created, with all the powers pertaining to domestic corporations of that kind under the laws of such

¹¹⁴ *Western &c. R. Co. v. Roberson*, 61 Fed. Rep. 592, 598; s. c. 22 U. S. App. 187; 9 C. C. A. (U. S.) 648; quoted by Mr. Circuit Judge Taft in *Louisville Trust Co. v. Louisville &c. R. Co.*, *supra*.

¹¹⁵ *Louisville Trust Co. v. Louisville*

&c. R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

¹¹⁶ *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

¹¹⁷ *Ante*, §§ 8727, 8728.

State.¹¹⁸ Thus, it has been held that if two or more railroad corporations, one created under the laws of Nebraska, and some created under the laws of other States, consolidate their stock and franchises into one corporation, under the provisions of the statutes of Nebraska, the consolidated corporation thus formed becomes a body corporate, pursuant to and under the laws of Nebraska, and is hence entitled to acquire property for its use under the right of *eminent domain*.¹¹⁹ In a Federal opinion by Mr. District Judge Dick, concurred in by Mr. Circuit Judge Simonson, it was held that a railway corporation, chartered by one State, becomes a domestic corporation of another State, by acquiring by consolidation the property and franchises of two domestic railway corporations of the latter State, with authority to exercise the powers conferred upon railroad corporations by the statutes of that State; and is hence liable to answer for all acts done within the limits of the State, as a domestic corporation.¹²⁰ Upon a well-known principle of interpretation,¹²¹ the power of a domestic corporation to consolidate with a *foreign* corporation does not exist, unless it is distinctly conferred by statute, and if the statute in which such a power is sought is doubtful and ambiguous, the doubt must be resolved against the existence of the power.¹²² The consolidation of a corporation organized in one State, which has been incorporated in another State, with a corporation of a third State, transfers the franchises obtained by the incorporation in the second State to the consolidated organization.¹²³

§ 8248. Effect of Interstate Consolidations upon Federal Jurisdiction.— If we keep in mind the principle that an interstate corporation, formed by the consolidation of several corporations in conformity with the laws of the States respectively in which

¹¹⁸ *Ashley v. Ryan*, 49 Ohio St. 504, 529; s. c. 28 Ohio L. J. 41; 31 N. E. Rep. 721; 12 Rail. & Corp. L. J. 126; aff'g 6 Ohio C. C. 208; s. c. aff'd, 153 U. S. 436.

¹¹⁹ *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171; s. c. 49 N. W. Rep. 1110; 10 Rail. & Corp. L. J. 447.

¹²⁰ *Bradley v. Ohio & C. R. Co.*, 119 N. C. 918; s. c. 78 Fed. Rep. 387.

¹²¹ *Post*, § 8298.

¹²² Pursuing this line of interpretation, it was held by the Supreme Court of Illinois that, in the year 1882, rail-

road corporations organized under the laws of that State had no authority whatever, unless granted by their respective special charters, to consolidate with railroad companies of other States; but the then prevailing legislative and public policy was opposed to such consolidations: *American Loan & C. Co. v. Minnesota & C. R. Co.*, 157 Ill. 641; s. c. 28 Chic. Leg. News, 99; 42 N. E. Rep. 153.

¹²³ *Louisville Trust Co. v. Louisville & C. R. Co.*, 43 U. S. App. 550; s. c. 75 Fed. Rep. 433.

each of such constituent corporations exists, or the analogous principle that a corporation formed in one State under the laws thereof and registered in other States, becomes a *domestic corporation* in each of such States,—we shall have the key for solving a number of questions with regard to the jurisdiction of the Circuit Courts of the United States as depending upon divers State citizenship. Let us suppose the case where an interstate railway system has been sold in a proceeding to foreclose a mortgage thereon, and where the purchaser has first organized a corporation under the laws of North Carolina to own and operate the same, and has conveyed to it such of the property, so purchased, as exists within that State; and has afterwards procured a corporate organization for the same purpose in other States into which the system extends and has conveyed to such other corporation the properties and franchises purchased by him at the sale; and that thereafter the corporation formed in North Carolina is sued in that State, and attempts to remove the cause to the Circuit Court of the United States on the ground that it is a corporation of one of the other States,—this motion will not be granted, because it is a corporation of North Carolina.¹²⁴ A railway corporation organized under the laws of Missouri, and hence a “citizen” of that State for the purposes of Federal jurisdiction, purchased a line extending into Arkansas and became incorporated under the laws of that State, which, in terms, made it a domestic corporation of that State. In the operation of its road in Missouri a person was killed, and his widow brought an action against it in the Circuit Court of the United States in Arkansas to recover damages on the ground of negligence. In order to sustain the jurisdiction of the Federal court on the ground of diverse State citizenship, it was necessary that the corporation which did the alleged injury and which she was suing, should be regarded as a “citizen” of Arkansas; since this was necessary to make the plaintiff and the defendant “citizens” of different States within the meaning of the Federal Constitution and Judiciary Act. On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, the Supreme Court of the United States held that, although the reincorporation in Arkansas had made the Missouri corporation a domestic corporation of that State, yet it did not make it a “citi-

¹²⁴ *Bradley v. Ohio &c. R. Co.*, 78 (overruling *Hudson v. Charleston &c. Fed. Rep.* 392; *s. c.* 119 N. C. 918 — *R. Co.*, 55 *Fed. Rep.* 248).

zen" of Arkansas for the purposes of Federal jurisdiction.¹²⁵ Indeed, it is not easy to perceive how the same corporation, for the purposes of Federal jurisdiction or for any other purpose, could be regarded as a "citizen" of two States at the same time. If it was "conclusively presumed" to be a citizen of Missouri, the State of its origin, it could not very well be "conclusively presumed" to be a citizen of another State at the same time. But the better reason for the decision of the court was one which the judge who wrote its opinion, failed to grasp. It was that the re-incorporation in Arkansas created, for juridical purposes, two corporations, one dwelling in Missouri and another dwelling in Arkansas; and that it was the Missouri corporation, and not the Arkansas corporation which did the mischief. The plaintiff, therefore, should have brought her action in Missouri against the corporation which did the wrong, and not in Arkansas against the corporation which had nothing to do with the wrong; and if she had brought it in a State court in Arkansas the conclusion ought to have been the same.¹²⁶ Comprehensively stated, a corporation formed by the consolidation of corporations of several different States, pursuant to the laws of each State, is, within each State, a corporation of that State; and hence, cannot be sued in any one of such States by a citizen thereof, in a court of the United States, on the ground of diverse State citizenship of the parties: both are citizens of the same State.¹²⁷ This question has been so far *hocus-pocused* by the greed of jurisdiction existing in some of the Federal courts, that one of the *domestic* corporations so created can, in its character of domestic corporation in one of the States and in its fictitious character of "citizen" of such State, bring and maintain, in a court of the United States, an action in another State in which it has also been incorporated and in which it is hence a domestic "citizen," against another citizen of the latter State;¹²⁸ whereas, as just seen, if the last-named "citizen" attempts to sue the same corporation in a Circuit Court of the United

¹²⁵ *St. Louis &c. R. Co. v. James*, 161 U. S. 545.

¹²⁶ From the conclusion of the majority. Mr. Justice Harlan dissented. He thought that *both* corporations were liable under the authority of *Pennsylvania R. Co. v. Jones*, 155 U. S. 333.

¹²⁷ *Missouri Pac. R. Co. v. Meeh*, 69

Fed. Rep. 753; s. s. 16 C. C. A. 510; s. c. 30 L. R. A. 250 (where the applicatory decisions are carefully gone over by Mr. Circuit Judge Thayer).

¹²⁸ *Nashua &c. R. Corp. v. Boston &c. R. Corp.*, 136 U. S. 356; s. c. 10 *Sup. Ct. Rep.* 1004; *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 *Fed. Rep.* 433, 440.

States within the State where he resides, he is confronted with the proposition that he cannot do it, because it is a domestic citizen of the State whereof the plaintiff is also a citizen. It is, in any one of the States in which it is incorporated, a *foreign* "citizen" for the purpose of being a *plaintiff* therein, but a domestic "citizen" for the purpose of being a *defendant* therein. Such a corporation may, through the favor of the Federal court, be supposed to possess the qualities which the English orator ascribed to Napoleon,— "proof against peril and endowed with ubiquity."

ARTICLE IV. OTHER MATTERS RELATING TO CONSOLIDATION.

SECTION

8251. Of corporations *de facto* formed by attempted consolidations.

8252. What attempts at consolidation do not even create corporations *de facto*.

8253. Estoppel against denying the validity of consolidation.

8254. Payment for the shares issued by the consolidated corporation.

8255. Secret agreements outside the

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articles of consolidation not enforceable against consolidated company.

8256. Validity of "organization tax," exacted in case of a consolidation.

8257. Accounting between the constituent corporations where an attempted consolidation proves abortive.

§ 8251. Of Corporations De Facto Formed by Attempted Consolidations.— In a recent case there is a learned discussion by Mr. Federal Circuit Judge Taft as to what attempts at consolidation create a corporation *de facto*; and he likens it to the question of what constitutes an *officer de facto*; and though the analogy between the case of a public officer *de facto*, who deals with rights which exclusively concern the State, and a private corporation *de facto* which deals with subjects in which the State has no direct concern, is not perfect,—yet the conclusion of the learned judge conforms to the best definitions: "It may be safely stated as the rule, that when persons assume to act as a body, and are permitted by acquiescence of the public and the State to act as if they were legally a particular kind of corporation, for the organization, existence and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapaci-

tated by the law to do so."¹²⁹ The rule as to what constitutes a *de facto* corporation, formed by an attempted consolidation of pre-existing corporations, seems to be the same as that relating to corporations regularly formed in the first instance. It is that, in order to create a *de facto* corporation, there must be a law under which a corporation of the kind in question might be organized, together with user under such law.¹³⁰ If there was no law in existence authorizing the consolidation at the time when it was attempted to be made, then, the subsequent passage of a statute authorizing such a consolidation — not retroactive in its operation — will not validate the attempted consolidation, so far as to make the consolidated body a corporation *de facto*.¹³¹ From this it follows that the foregoing statement of what is necessary to create a *de facto* corporation must be corrected so as to read that there must be: 1. A statute under which a consolidation, such as the one attempted, *might* have taken place. 2. A *bona fide attempt* at consolidation under such statute. 3. Followed by a *user* of the corporate powers and franchises which might have been acquired by such a consolidation.¹³²

§ 8252. What Attempts at Consolidation do not even Create Corporations *de Facto*.— As already seen,¹³³ in order to create a corporation *de facto*, there must be a *law* under which such a corporation as the one in question is claimed to be, could be lawfully created, together with *user* under such law.¹³⁴ Upon this principle, it has been held that the mere fact that corporations of different States attempt to consolidate, in the absence of a statute authorizing such consolidation, and assume to act as a consolidated corporation, even in the full belief that they are legally incorpo-

¹²⁹ Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. Rep. 642, 650; citing Ashley v. Supervisors, 16 U. S. App. 656, 668; s. c. 8 C. C. A. 445; 60 Fed. Rep. 55 (case of a county and therefore a strictly *public* corporation); State v. Carroll, 38 Conn. 449 (case of a public officer); Norton v. Shelby County, 118 U. S. 425; s. c. 6 Sup. Ct. Rep. 1221 (case of a public corporation); Blackburn v. State, 3 Head (Tenn.) 690.

¹³⁰ American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641; s. c. 28 Chi. Leg. News, 99; 42 N. E. Rep. 153.

¹³¹ American Loan &c. Co. v. Minnesota &c. R. Co., *supra*.

¹³² *Ante*, § 8207.

¹³³ 1 Thomp. Corp., § 505; *ante*, § 8207.

¹³⁴ American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641; s. c. 42 N. E. Rep. 153; 28 Chicago Leg. News, 99. See for the governing principle, without reference to the question of consolidation,—Williamson v. Kokomo Building &c. Asso., 89 Ind. 389; Easton v. Walker, 76 Mich. 579; Evenson v. Ellingson, 67 Wis. 634.

rated, will not constitute them a corporation *de facto*.¹³⁵ It follows that the corporate existence of such a body may be assailed collaterally, and that its attempted contracts are void.¹³⁶ A supposed corporation thus attempted to be created without statutory authorization, is not liable for the debts of one of the precedent corporations.¹³⁷

§ 8253. Estoppel against Denying the Validity of Consolidation.—

On a principle already stated and much considered,¹³⁸ persons who deal with a body claiming to be a corporation formed by the consolidation of two or more pre-existing corporations, as though it were a corporation *de jure*, thereby recognize its corporate existence and estop themselves from subsequently denying the same, in like manner as in case of a body claiming to be an original corporation.¹³⁹ Again, in an action against a body created by an attempt at consolidation, seeking to charge it as a corporation, the defendant is estopped from denying the validity of the consolidation. In other words, it is estopped to plead itself out of existence by asserting that it did not comply with the requirements of the statute relating to consolidation.¹⁴⁰ To be more explicit, it has been held that a corporation which has, in effect, consolidated with another corporation, is estopped to assert that the proceedings for consolidation were not in accordance with the terms of the statute, in an action against it to recover the amount of a judgment against the other corporation on the ground that there was a consolidation, and that consequently the consolidated corporation is liable to pay the debts of the constituent corporations.¹⁴¹ Manifestly this principle does not apply so as to estop one who becomes a holder of a county bond issued to a railroad corporation two days after it makes an attempted consolidation with another corporation, but derives title to the bond through the constituent corporation, and not through the pretended consolidated corporation, and whose title to the bond may be supposed to de-

¹³⁵ American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 652; s. c. 42 N. E. Rep. 153; 28 Chi. Leg. News, 99.

¹³⁶ American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641; s. c. 28 Chi. Leg. News, 99; 42 N. E. Rep. 153.

¹³⁷ Kavanagh v. Omaha Life Asso., 84 Fed. Rep. 295.

¹³⁸ 1 Thomp. Corp., § 518, *et seq.*

¹³⁹ Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. Rep. 642.

¹⁴⁰ Chicago &c. R. Co. v. Ashling, 160 Ill. 373; s. c. 43 N. E. Rep. 373; aff'g s. c. 56 Ill. App. 327.

¹⁴¹ Chicago R. Co. v. Ashling, *supra*.

pend upon the question whether the corporation receiving it was in existence at the time, from denying the validity of the attempted consolidation; since he has entered into no contract and done no act recognizing its existence.¹⁴²

§ 8254. **Payment of the Shares Issued by a Consolidated Corporation.**—Applying the rule that the capital stock of a corporation may be paid for in property at a reasonable valuation, it has been held that the *good-will* of a constituent corporation may be properly applied, at its market value, to the payment of stock issued by a consolidated corporation to the members of the constituent corporation.¹⁴³

§ 8255. **Secret Agreements Outside the Articles of Consolidation not Enforceable against Consolidated Company.**—Secret agreements relating to the terms of consolidation of corporations, other than those prescribed by the agreement of consolidation made between the constituent corporations, cannot be enforced against the consolidated corporation, directly or indirectly, for the benefit of any portion of the stockholders. The reason is that the stipulations in the articles of consolidation as to what should be paid for a surrender of the shares, properties and rights of the constituent corporations are presumed to embrace the entire contract, and hence the consolidated corporation cannot be burdened with further payments.¹⁴⁴

§ 8256. **Validity of "Organization Tax" Exacted in Case of a Consolidation.**—A State statute requiring the payment of a fee to the Secretary of State for filing articles of agreement of incorporation, and also articles of consolidation, which fee is to be proportional to the authorized capital of the corporation so organized, is a valid law, and applies to articles of agreement of consolidation between a domestic corporation and a corporation of another State, as well as to consolidations between domestic corporations only. The reason is that the State is not bound to permit corporations to consolidate, and may consequently impose such terms upon con-

¹⁴² *Morrill v. Smith County*, 89 Tex. 529, 554.

¹⁴⁴ *Trenton Pass. R. Co. v. Wilson*, 55 N. J. Eq. 273; s. c. 37 Atl. Rep. 476.

¹⁴³ *Beebe v. Hatfield*, 67 Mo. App. 609.

solidations as it may see fit; and corporations which accept the privilege must accept it with the burden.¹⁴⁵

§ 8257. **Accounting between the Constituent Corporations where an Attempted Consolidation Proves Abortive.**—If a consolidation has been attempted and has progressed so far that a joint committee has taken control of both companies and carried on their business and divided the profits, and the scheme is enjoined because *ultra vires*, or is rescinded, or for any reason becomes abortive, an accounting in equity, may be had between the constituent companies, unless the scheme of consolidation was illegal in such a sense that a court of justice ought not to aid in any degree any party connected with it,—which can seldom be the case, in view of the fact that there are generally innocent stockholders or bondholders—often widows and orphans—whose rights ought to be conserved; and after a bill in equity to enjoin an *ultra vires* consolidation has been dismissed by reason of a voluntary rescission of the consolidation agreement, a defendant who has, in a cross-bill, prayed for an accounting, may have the suit retained for that purpose.¹⁴⁶

¹⁴⁵ Ashley v. Ryan, 49 Ohio St. 504; s. c. 28 Ohio L. J. 41; 31 N. E. Rep. 721; 12 Ry. & Corp. L. J. 216; 669; s. c. 35 Am. Rep. 681; 13 South. aff'g 6 Ohio C. C. 208; s. c. aff'd, 153 U. S. 436; 38 L. ed. 773; 14 Sup. Ct. Rep. 865.

¹⁴⁶ Greenville Compress &c. Co. v. Planters' Compress &c. Co., 70 Miss. Rep. 879.

CHAPTER CCVIII.

REORGANIZATION OF CORPORATIONS.

SECTION	SECTION
8259. Schemes of reorganization favored.	8270. Acts of the committee of reorganization.
8260. Corporate life can be prolonged only by the State.	8271. Excluding stockholders and bondholders from participation after a prescribed time.
8261. Prolongation of corporate existence under general statutes and special grants.	8272. Assuming the debts of the old corporation.
8262. Statutory privilege of reorganizing not protected as a contract by the Constitution of the United States.	8273. Payment of an "organization tax."
8263. Rechartering a corporation already existing in another State.	8274. Reorganization creates a new corporation, with a new lease of life.
8264. Reorganizing a domestic corporation in another State.	8275. General rule that reorganized corporation is not liable for debts of old one.
8265. Reorganization after foreclosure sale.	8276. Exceptions to the foregoing general rule, showing when the new corporation is liable for the debts of the old.
8266. Reorganization by bondholders without foreclosure sale.	8277. Circumstances under which new company liable for new business transacted in name of old company.
8267. Reorganization pending an injunction and receivership.	8278. New company succeeds to what rights of the old.
8268. Reorganization by bondholders and stockholders to the exclusion of general creditors.	
8269. Assent of stockholders.	

§ 8259. Schemes of Reorganization Favored.—As stated in a former volume,¹ schemes for the reorganization of insolvent corporations which, fairly conceived and faithfully carried out, result in keeping great properties together which might otherwise be destroyed and dissipated, and in preserving, to some extent at least, the rights of the parties specially interested therein, are favored by the courts. Upon this question it was said by Mr. U. S. Circuit Judge Jenkins: "In dealing with such vast en-

terprises as that carried on by the defendant corporation, a reorganization in some such way as is attempted here, is the only feasible method of protecting the relative rights of all the parties interested. It can be done only by co-operation; and, in the absence of fraud or oppression, courts of equity are disposed to aid rather than to thwart, such schemes of reorganization."²

§ 8260. Corporate Life can be Prolonged Only by the State.—

It seems scarcely necessary to suggest the proposition that, as the life of a corporation can only be given, so it can only be prolonged, by the State.³ Therefore, a conveyance by a corporation, during its corporate life, of all its property and franchises cannot impart to any other corporation, or to a natural person, the power to continue the exercise of its corporate franchise after it has expired by limitation of law.⁴

§ 8261. Prolongation of Corporate Existence under General Statutes and Special Grants.— General statutes exist in some of the States under which corporations may prolong or renew their period of existence, by complying with prescribed conditions; and these have sometimes been subjects of judicial interpretation.⁵ Where it became a question whether the corporation suing on a note was the same corporation as the one to whom the note was executed, and it appeared that both were organized under the same general

² Central Trust Co. v. United States Rolling Stock Co., 56 Fed. Rep. 5, 7. The existence of a corporation organized under N. Y. Laws 1848, chap. 40, known as the Manufacturing Corporation Act, is not terminated by the repeal of such statute by N. Y. Laws 1890, chap. 564, substantially re-enacting the former Act, with amendments, and providing that it shall be construed as a continuation of the former laws, modified or amended, and not as a new enactment; and *reorganization* under the latter statute is *not necessary*: Close v. Potter, 49 N. Y. St. Rep. 590; s. c. 2 Misc. (N. Y.) 1; 21 N. Y. Supp. 1086.

³ Asheville Division v. Aston, 92 N. C. 578.

⁴ Virginia Cañon Toll Road Co. v. People, 22 Colo. 429; s. c. 37 L. R. A. 711; 4 Am. & Eng. Corp. Cas. (N. S.) 203; 45 Pac. Rep. 398.

⁵ Meaning of the words "limitation of law" in such a statute authorizing a corporation whose existence is about to terminate by *limitation of law* to continue its existence: Ovid Elevator Co. v. Secretary of State, 90 Mich. 466; s. c. 51 N. W. Rep. 536. A street railway company, originally chartered for thirty years only, which accepts, a few years before the expiration of such time, the provisions of an act renewing and extending its charter act for fifty additional years, has no authority subsequently to apply for and obtain from the Secretary of State, before the expiration of the thirty years, an independent renewal of its charter, under the Georgia Act of December 20, 1893, since the act applies only to corporations whose charters have expired or are about to expire: Augusta & c. R. Co. v. Augusta, 100 Ga. 701; s. c. 28 S. E. Rep. 126.

statute; that the main purposes of both were identical; that they were organized, officered and managed by the same person; and "that the purpose of the last organization was to supplant and take the place of the original, as a mere amendment or reorganization;"—it was held that the mere fact that, in submitting to the court, as required by the statute, "the features of 'amendments to be added to or changed from the old charter,'" in order to have an order approving the same, "the parties unnecessarily included in the amendments the entire articles of association, ought not to destroy the intended identity of the new with the old."⁶

§ 8262. **Statutory Privilege of Reorganizing not Protected as a Contract by the Constitution of the United States.**—The privilege conferred by a general statute upon the purchasers at foreclosure sales of railroads, to organize a corporation to receive and hold the purchased property, is a contract within the meaning of the Constitution of the United States as interpreted in the Dartmouth College decision and its successors. The State may, therefore, by an act passed after such an enabling act and after a foreclosure sale, by another statute, impose on the purchasers of such sale the payment of what is called a *reorganization tax*, with respect to the corporation which was organized to receive and hold the purchased property.⁷

§ 8263. **Rechartering a Corporation Already Existing in Another State.**—One State may incorporate a corporation of another State as such, without any specific provisions for the stock or internal government of the new corporation, and it will not be a license to a foreign corporation, but will be its own domestic corporation.⁸ For example, a statute entitled, "An Act to Incorporate" a certain railway company, and providing that such railway company, "a corporation organized under the laws" of another State, "is hereby constituted a corporation" of the domestic State, with powers mentioned,—makes such company a domestic corporation

⁶ Grand River College v. Robertson, 67 Mo. App. 329, 336. Inability to extend corporate existence by reincorporating under N. Y. Laws 1892, chap. 691, § 4: People v. James, 5 App. Div. (N. Y.) 412; s. c. 39 N. Y. Supp. 313.

⁷ People v. Cook, 148 U. S. 397; s. c. 37 L. ed. 498; 13 Sup. Ct. Rep. 645.

⁸ Louisville Trust Co. v. Louisville &c. R. Co., 43 U. S. App. 550; s. c. 75 Fed. Rep. 433.

of the State.⁹ Where a corporation is created by the concurring action of the legislatures of two or more States, or where two or more corporations created by the legislatures of as many States consolidate,—the corporation thus created is a *domestic corporation in each of the States*, and not a domestic corporation of one of them and a foreign corporation in the others; since, from the nature of things, the action of the legislatures of several distinct sovereign States cannot be *joint* action, but can only be *concurrent* action. Such a corporation, however, is a domestic corporation in each of the States rechartering it or permitting its consolidation.¹⁰ It follows that the result of the creation by one State of a corporation of a given name, and the declaration of the legislature of an adjoining State that the same legal entity shall be or become a corporation of that State, and be entitled to exercise within its borders all of its corporate functions by the same board of directors, is not to create a single corporation, but *two corporations* of the same name, but having a different paternity.¹¹

§ 8264. **Reorganizing a Domestic Corporation in Another State.**—For the directors of a domestic corporation to transfer all its property to another corporation, which has been organized in another State for the purpose of acquiring its business, the purpose being to reorganize the domestic corporation in the foreign State without a dissolution, is void, both as against non-assenting stockholders and the State. It is said that a domestic corporation cannot be reorganized in another State without first being lawfully dissolved

⁹ Louisville Trust Co. v. Louisville &c. R. Co., 43 U. S. App. 550; s. c. 75 Fed. Rep. 433.

¹⁰ Missouri P. R. Co. v. Meeh, 69 Fed. Rep. 753; s. c. 32 U. S. App. 691; s. c. 16 C. O. A. 510; 12 Am. R. & Corp. Rep. 218; 30 L. R. A. 250 (for the purposes of Federal jurisdiction). See also Chicago &c. R. Co. v. Auditor-General, 53 Mich. 79, 91; s. c. 18 N. W. Rep. 586; Quincy Bridge Co. v. Adams County, 88 Ill. 615, 619.

¹¹ Missouri &c. R. Co. v. Meeh, 69 Fed. Rep. 753; s. c. 32 U. S. App. 691; 16 C. O. A. 510; 12 Am. R. & Corp. Rep. 218; 30 L. R. A. 250: The legislature of South Carolina may provide for the incorporation in that State of a railroad company organized in another State, under S. C. Const. art. 9,

§ 8, providing that no license to build, operate, or lease a railroad shall be granted to any foreign corporation or association, but the owners or projectors shall first become incorporated under the laws of the State, and that consolidation shall be allowed only when the consolidated company shall become a domestic corporation of the State: State v. Tompkins, 48 S. C. 49; s. c. 25 S. E. Rep. 982. That a domestic corporation organized by the purchaser on foreclosure of the property of a railroad company is not superseded or destroyed by a foreign corporation organized under the same name in another State, but not recognized or adopted by the State in which the former was organized: Bradlev v. Ohio &c. R. Co., 119 N. C. 918; s. c. 78 Fed. Rep. 387.

in the domestic State. Where such an attempt has been made, the Attorney-General (in New York) may maintain an action in the name of the people of the State to remove the directors and to compel them to account for the property of the corporation thus unlawfully diverted. In giving the opinion of the court, Vann, J., said: "A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed a dissolution. The law made it, and the law only can put an end to it. As it cannot take its own life directly, it cannot do so indirectly, for that would be a fraud upon the law and against public policy. By the transaction complained of, the defendant company was stripped of all its property, and thus prevented from going on in business, and deprived of all means of carrying into effect the object of its existence. While a corporation may sell its property in order to pay debts, or to carry on its business, it cannot sell its property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement, with a majority of non-resident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate. Whether the process by which it was sought to convert the New York corporation into a California corporation, is called reorganization, consolidation, or amalgamation, it was the exercise of a power not delegated, and was void. It was corporate burial in New York for resurrection in California. While the stockholders who consented may be estopped by their acts, those who did not consent can take advantage of this violation of their rights, and the State of New York can demand that those who did the wrong shall make restitution."¹²

§ 8265. **Reorganization after Foreclosure Sales.**—Enabling acts exist in many of the States, such as that of Louisiana,¹³ under which

¹² *People v. Ballard*, 134 N. Y. 269, 294; s. c. 17 L. R. A. 737; 48 N. Y. St. Rep. 166; 38 Am. & Eng. Corp. Cas. 666; 6 Am. R. & Corp. Rep. 635; 32 N. E. Rep. 54; rehearing denied in 136 N. Y. 639; 48 N. Y. St. Rep. 846; 32 N. E. Rep. 611. In support of this conclusion the court cited *Abbott v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578, "as a sound and valuable authority;" and referred to *Frothingham v. Barney*, 6 Hun (N. Y.) 366, and to *Taylor v. Earle*, 8 Hun (N. Y.) 1, for more or less close analogies.

¹³ La. Act 1887, Act No. 38.

purchasers at foreclosure sales of the property and franchises of railway companies may organize a corporation under such name as they may adopt, which thereupon succeeds to such franchises and property, and takes the corporate capacity of the corporation against which the foreclosure proceedings were conducted.¹⁴

§ 8266. Reorganization by Bondholders without Foreclosure Sale.—A statute exists in Maine under which a majority of the holders of the mortgage bonds of an insolvent corporation may reorganize the corporation and take possession of the property, without a foreclosure proceeding. Such action was recently taken in a case in that State, although the remedy by foreclosure at the suit of the trustees in the mortgage, upon request of one-third of the bondholders, was still available. In a case arising out of that proceeding, there is a long and lucid exposition of the statute by Mr. Justice Strout, covering many questions. The constitutional validity of the statute, and the title of the new corporation to the property, subject to the naked legal title of the trustees in the mortgage, which it was held to be their duty to convey to the new corporation, were affirmed. Among other things, it was held that a holder of the mortgage bonds, who had participated in the formation of the new corporation, could not destroy its existence by a subsequent transfer of his bonds to third parties; also that a bondholder could not be compelled to exchange his bonds for shares of the new corporation, but that dividends of the new corporation must be distributed to its stockholders and to the holders of the exchanged bonds of the old corporation, in equal proportions.¹⁵

§ 8267. Reorganization Pending an Injunction and Receivership.—In New Jersey a corporation which has been declared insolvent has power to take steps towards a reorganization and a resumption of its property and business pending an injunction and receivership under the New Jersey Corporation Act, and may employ agents to aid in the carrying out of such purposes, for whose compensation it will be liable if the injunction is dissolved and the receiver removed.¹⁶

¹⁴ *Vicksburg &c. R. Co. v. Elmore*, 46 La. An. 1237; s. c. 15 South. Rep. 701.

¹⁵ *Somerset R. Co. v. Pierce*, 88 Me. 86; s. c. 33 Atl. Rep. 772.

¹⁶ *Linn v. Joseph Dixon Crucible*

§ 8268. **Reorganization by Bondholders and Stockholders to the Exclusion of General Creditors.**—An able Federal judge has recently taken the view that bondholders and stockholders, in agreeing upon terms for a reorganization after the purchase of the property of a railroad company upon foreclosure sale, which should give the stockholders an interest in the new corporation, are not bound to include general creditors in the plan, or tender them an opportunity of joining therein. He held that the plan for such a reorganization which lets stockholders in the old company into the new organization upon agreed terms, but which does not include general creditors, or tender them an opportunity to join therein, is not invalid, unless the scheme is one to give to stockholders that which should go to creditors, or otherwise to defraud creditors. In the particular case, the stockholders were permitted to participate in the reorganization, and for their shares were given an equal number of shares in the new organization upon the payment of a given sum per share, which sum, it appeared, was largely in excess of the market price of the new shares. On this state of facts, the court could not say that the including of the new stockholders in the organization was a fraud upon the creditors. Hence, the court concluded that a bill by general creditors who sought to set aside the decree for a sale of the property to foreclose the mortgage, and to enjoin the sale and the carrying out of the scheme of organization, and which asked that the court formulate a new and just plan of reorganization giving to the general creditors their appropriate proportion of bonds and stock, and determining the terms upon which that proportion should be awarded,—was wholly without equity, where there was no offer by the plaintiffs to enter into or to be bound by any scheme for reorganization.¹⁷ The profession will not agree with the learned judge that a scheme for reorganization which lets in stockholders to the exclusion of creditors is not inequitable; but they will agree that a court of equity has properly nothing to do with the re-

Co., 59 N. J. L. 28; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 494; 35 Atl. Rep. 2. The Pennsylvania Executive Department *will not determine disputed questions of fact* and conflicting claims to the right to reorganize a corporation; but the papers for reorganization will be filed when formally correct, and such questions and

claims left to the courts: *Re Fayette Gas Fuel Co.*, (Pa. Exec. Dept.), 30 W. N. C. 256; s. c. 1 Pa. Dist. R. 444; 11 Pa. Co. Ct. 488.

¹⁷ *Paton v. Northern P. R. Co.*, 85 Fed. Rep. 838, per Jenkins, J.; distinguishing *Chicago & C. R. Co. v. Howard*, 7 Wall. (U. S.) 392.

organization of an insolvent corporation, any more than it has with its original organization. A court of equity, in such a case, discharges its just functions when it forecloses the mortgage, subjects the property to sale, and distributes the proceeds according to the priorities of the creditors.¹⁸

§ 8269. Assent of Stockholders: When Minority Bound and When Not.— In the absence of a constitutional, statutory or charter provision existing prior to the formation of the usual compact among the stockholders and hence forming a part of it, a majority of them have no power to involve the minority in a reorganization without their consent, in such manner as to compel the minority to elect between a new contractual relation with a new company, and the loss of their shares in the old company or compensation for them on any arbitrary basis which the organization may give. The minority has a lawful right to maintain that the contractual relations which are established with a corporation whose shareholders they become do not include a contractual relation with any other corporation; and there is no right in law to compel it to elect between such new contractual relation and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give. But it does not follow that a court of equity, will, under all circumstances, aid a majority shareholder in undoing such an organization.¹⁹ A minority shareholder who, though he has protested against a reorganization scheme, subscribes for his proportion of the stock of the new company at such a time as justifies the majority stockholders in assuming that the new company is authorized to receive the transfer and carry on the business of the old company, yet

¹⁸ From a somewhat involved case the conclusion is extracted that a former stockholder of a railroad corporation has a claim upon the funds set apart, by an agreement for reorganization, for the payment of the floating indebtedness of the amount at which his stock, which he loaned to the company for use as collateral in securing a loan, was accepted by the creditor in discharge of his debt; but that the difference between that amount and the amount at which the company agreed to account for the stock does not constitute a claim

against the fund: *Davidson v. Mexican Nat. R. Co.*, 11 App. Div. (N. Y.) 28; s. c. 42 N. Y. Supp. 1015.

¹⁹ *Post v. Beacon Vacuum Pump &c. Co.*, 84 Fed. Rep. 371; s. c. 50 U. S. App. 271; 28 C. C. A. 431. When minority not bound, see *Mason v. Pewabic Min. Co.*, 25 Fed. Rep. 882. That the shares of dissenting shareholders cannot be confiscated under a scheme of reorganization, see *Gresham v. Island City Savings Bank*, 2 Tex. Civ. App. 52; s. c. 21 S. W. Rep. 556.

stands by for eighteen months before taking any legal action — is estopped from maintaining a suit to rescind the transfer.²⁰ Mere delay on the part of a stockholder to assert his rights as an old stockholder after the corporation has been reorganized and new stock issued and sold without his concurrence, or the fact that he accepted money paid him as a creditor of the corporation, will not it has been held, deprive him of all right of recognition; although such delay will prevent his invoking the aid of equity to reinstate him as a stockholder, and restrict him to the recovery of such damages as he may have sustained.²¹ Non-assenting stockholders of a corporation, the capital stock of which, upon its reorganization after suspension of business, is increased by the surrender of old stock and the issue of new shares representing the rights of the old stockholders, augmented by a large sum contributed by the new stockholders, are not entitled to be placed on the same footing with the latter, but are entitled to recognition only to the extent of the proportionate interest their stock continues to represent.²²

§ 8270. **Acts of the Committee of Reorganization.**— Schemes of reorganization of insolvent corporations are generally carried out by committees appointed by the bondholders from their number. Such schemes — often complicated — and the doings of the committees thereunder have been the subjects of frequent adjudication, but from these judgments in general it would be difficult to extract any rule of law or equity. It has been held that railroad bondholders who have appointed a committee of *three* to purchase the property and organize a new corporation, taking securities back from it, cannot complain that only *two* of the committee so acted, where they have agreed to such action, and the third member of the committee has agreed to abide by the action of a person selected by him as counsel for the committee.²³ Construing such

²⁰ Post v. Beacon Vacuum Pump &c. Co., 84 Fed. Rep. 371; s. c. 50 U. S. App. 271; 28 C. C. A. 431.

²¹ Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52; s. c. 21 S. W. Rep. 556.

²² Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52; s. c. 21 S. W. Rep. 556. The chairman of a committed appointed to reorganize a corporation may *extend the time ap-*

pointed by the committee for the acceptance by a stockholder of the plan of reorganization beyond that appointed by the committee, under a provision of the plan that the committee may limit the time in their discretion, where he has extended it in favor of other stockholders without objection by the committee: Raleigh v. Earle, 5 Pa. Dist. Rep. 111.

²³ Coppell v. Hollins, 91 Hun (N.

an agreement, it has been held that a reorganization committee, authorized to settle claims against the company which are entitled to priority of payment over the bondholders, has authority to settle a disputed claim reduced to judgment, upon its face reciting the existence of a conductor's lien upon the property of the company, although the right of such lien to priority, as well as its validity, may be doubtful.²⁴

§ 8271. Excluding Stockholders and Bondholders from Participation after a Prescribed Time.—Under a bondholder's agreement for the reorganization of a corporation by which the stockholders are given the privilege, upon payment of certain sums, to acquire shares in the reorganized company, but upon failure to pay the assessment the privilege of receiving such shares to be ratably distributed among the holders of its certificates of stock who shall

Y.) 570; s. c. 36 N. Y. Supp. 500; s. c. 71 N. Y. St. Rep. 529.

24 *Central Trust Co. v. Carter*, 78 Fed. Rep. 225; s. c. 41 U. S. App. 663; 24 C. C. A. 73. That a committee appointed by railroad bondholders to purchase the mortgaged property, to which the bondholders transfer their bonds to enable it to make the purchase under an agreement providing that the bondholders shall deposit the bonds with a *designated company*, and at the same time deposit with it, to the order of the committee, a specified amount for each bond deposited, may obtain the credit necessary to make the purchase from *another company*,—where the one named in the agreement is unwilling to advance the necessary money,—see *Coppell v. Hollins*, 91 Hun (N. Y.) 570; s. c. 71 N. Y. St. Rep. 529; 36 N. Y. Supp. 500. That a written announcement by a committee for the reorganization of a railroad company, suggesting that a modification of the plan of reorganization, by reducing the amount of bonds to be issued for reorganization purposes, may be necessary,—will not be deemed a change of the original plan, preventing the committee from issuing reorganization bonds to the amount originally contemplated, where none of the requirements of the reorganization agreement with respect to notifying the

parties in case of substantial changes in the plan of reorganization are complied with in making the announcement,—see *Barnard v. Fitzgerald*, 50 N. Y. Supp. 309; s. c. 23 Misc. (N. Y.) 181. That a trust company does not lose control of a scheme to reorganize a railroad company, under which it is empowered to ascertain the floating debt and expense of reorganization, and assess the amount to be paid by stockholders to entitle them to new stock, by the mere fact of an unauthorized and ineffectual attempt of certain of its officers to make an assessment in its name,—see *Gernsheim v. Central Trust Co.*, 40 N. Y. St. Rep. 967; s. c. 16 N. Y. Supp. 127. That it is unnecessary to insert in a *scheme of arrangement* sanctioned by the court under the English Joint Stock Company Arrangement Act 1870, a reservation of the rights of sureties for the company's debts, or to insert in the order sanctioning it any express words staying proceedings by creditors or discharging contributories from further liability other than that imposed by the scheme, since such scheme is the alternative mode of liquidation allowed to be substituted for the winding-up, and becomes effective in such respect by operation of law,—see *Re London Chartered Bank of Australia*, (1893) 3 Ch. 540.

have paid their assessments, or, in case of their non-acceptance, to other persons willing to accept the privilege,—no action on the part of the reorganization committee to terminate the rights of a stockholder failing to make his payments is necessary, for the reason “that the holders of debt certificates and of stock who had paid their assessments, became entitled, as matter of right, to claim this stock upon payment of the assessment, where the holder of the original stock had failed to do so, pursuant to the terms of the reorganization agreement. It required no proceedings upon the part of the reorganization committee to terminate the rights of a defaulter under this agreement. The conditions of the agreement executed themselves. The moment the old stockholders made default, the rights of the others intervened, which they could enforce, and which the committee could not ignore.”²⁵

§ 8272. **Assuming the Debts of the Old Corporation.**— In some schemes of reorganization the new company assumes the debts, or a certain portion of the debts of the old corporation, or creates a fund for their payment. In such a case, it seems that a creditor of the old corporation may maintain an action against the new one to recover his debt from it, or to have it charged upon the trust fund; and that, in the case of an unreasonable delay in payment, it will be so charged with *interest* added.²⁶

§ 8273. **Payment of an “Organization Tax.”**— The reorganization, under the Business Corporation Law of New York,²⁷ of a corporation originally formed under the General Manufacturing Act of 1848, is a corporate act, and a new corporation is not

²⁵ Dow v. Iowa &c. R. Co., 70 Hun. (N. Y.) 186; s. c. 53 N. Y. St. Rep. 898; 24 N. Y. Supp. 292; aff'd, 144 N. Y. 426. On the contrary, the view of Judge Pennypacker, of the Philadelphia Common Pleas, was that a provision in a plan for the reorganization of a railroad corporation, whereby the non-acceptance of the plan by the holders of securities within a specified time would exclude them from all rights of participation in the reorganization, which was to be brought about by the purchase of the property under foreclosures of receiver's certificates, should not be looked upon with favor,

and ought not to be enforced if its enforcement would be inequitable: Raleigh v. Earle, 5 Pa. Dist. Rep. 111.

²⁶ Davidson v. Michigan National R. Co., 11 App. Div. (N. Y.) 28. Interpretation of an organization agreement under which it was held that the new company did not assume the payment of the bonds of the old corporation in any other way than by issuing new bonds and stock to take their place: Fernschild v. D. G. Yuengling Brew. Co., 154 N. Y. 667; s. c. 49 N. E. Rep. 151; aff'd 15 App. Div. 29; 13 Nat. Corp. Rep. 502; 44 N. Y. Supp. 106.

²⁷ Laws N. Y. 1892, chap. 691.

thereby created, which is bound to pay the organization tax prescribed by other statutes.²⁸

§ 8274. **Reorganization Creates a New Corporation, with a New Lease of Life.**—A reorganization of a corporation, as distinguished from a renewal or prolongation of the term of its existence under a charter or enabling statute, unquestionably creates a new corporation, whose life begins to run, not from the date of the organization of the predecessor corporation, but from the date of the reorganization, and continues during the period limited by the statute under which reorganization takes place.²⁹

§ 8275. **General Rule that Reorganized Corporation is not Liable for Debts of Old One.**—The *general rule* is that a *new* corporation, organized to succeed an old one, is not liable for the debts of the latter, provided always that it is in law a *new* corporation, and hence a different entity or person from the old one.³⁰ This exception to the rule will be noted in the next section. This has been held where the new corporation was created under the following circumstances:—Where a corporation had ceased to do business, and its stockholders, together with at least one other person, formed a new corporation, taking the assets of the old one, but not assuming or making any new contract to pay its debts;³¹ where

²⁸ Re Consolidated Kansas City &c. Co., 13 App. Div. (N. Y.) 50; s. c. 43 N. Y. Supp. 51. As to the payment of the organization tax upon a consolidation, see *ante*, § 8256.

²⁹ State v. Hannibal &c. Co., 138 Mo. 332; s. c. 36 L. R. A. 457; 39 S. W. Rep. 910. It has been held that the acceptance by a street railway company whose charter states that it is incorporated for the full term of thirty years without any provision for renewal or extension, of an act passed several years before the expiration of the thirty years, continuing the charter in force on specified conditions and with certain restrictions, makes the latter act the charter of the company, and its corporate rights, powers, and privileges are thereafter to be measured by its provisions: Augusta &c. R. Co. v. Augusta, 100 Ga. 701; s. c. 28 S. E. Rep. 126.

³⁰ 1 Thomp. Corp., § 263; Ewing v. Composite Brake Shoe Co., 169 Mass.

72; s. c. 7 Am. & Eng. Corp. Cas. (N. S.) 81; 47 N. E. Rep. 241; Austin v. Tecumseh Nat. Bank, 49 Neb. 412; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 382; Donnelly v. Hearndon, 41 W. Va. 519; s. c. 23 S. E. Rep. 646; Fernschild v. D. G. Yuengling Brew. Co., 154 N. Y. 667; Pennison v. Chicago &c. R. Co., 93 Wis. 344; s. c. 4 Am. & Eng. R. Cas. (N. S.) 573; 67 N. W. Rep. 702.

³¹ Here creditors of the old corporation cannot sue the new one at law because there is no privity of contract; but their equitable right to follow the assets of the old corporation into the hands of the new one remains: Ewing v. Composite Brake Shoe Co., 169 Mass. 72; s. c. 7 Am. & Eng. Corp. Cas. (N. S.) 181; 47 N. E. Rep. 241. See also Austin v. Tecumseh Nat. Bank, 49 Neb. 412; s. c. 35 L. R. A. 444; 5 Am. & Eng. Corp. Cas. (N. S.) 382; 68 N. W. Rep. 628.

a State banking corporation surrendered its charter, and its assets passed into the hands of trustees for the purposes of liquidation, and thereafter a *national* banking corporation was formed which did not succeed to the assets of the old one, nor assume its debts;³² where a reorganized corporation, which had become the purchaser of the assets of the precedent corporation at a foreclosure sale under a *second* mortgage, assumed certain debts of the precedent corporation, but did not assume debts of the class to which the plaintiff's debt belonged;³³ where there was a sale to foreclose a mortgage of the assets of a railroad corporation, and such assets were purchased by a new corporation;³⁴ where one corporation purchased at *private sale* the property and franchises of another.³⁵

§ 8276. Exceptions to the Foregoing General Rule, Showing when the New Corporation is Liable for the Debts of the Old.—

On the other hand, the reorganized corporation is liable for the debts of the old one: 1. When the circumstances are such as to warrant the conclusion that the reorganized corporation is not a *new* corporation, but merely a *continuation* of the old one, and hence the same person in law.³⁶ 2. Where it has, in express terms or by reasonable implication, assumed the debts of the old corporation.³⁷ 3. Where it has received the assets of the old corporation under such circumstances as to make the transaction a *fraud upon its creditors*.³⁸ 4. Where there is a statute imposing such lia-

³² *Donnelly v. Hearndon*, 41 W. Va. 519, 526; s. c. 23 S. E. Rep. 646.

³³ *Fernschild v. D. G. Yuengling Brewing Co.*, 154 N. Y. 667; aff'g s. c. 18 Misc. (N. Y.) 49; 40 N. Y. Supp. 1119; rev'g s. c. 15 App. Div. (N. Y.) 29.

³⁴ *Wiggins Ferry Co. v. Ohio & C. R. Co.*, 142 U. S. 396, 407; s. c. 35 L. ed. 1055; 12 Sup. Ct. Rep. 188. See also *Ferguson v. Ann Arbor R. Co.*, 17 App. Div. (N. Y.) 336; s. c. 45 N. Y. Supp. 172; *Campbell v. Pittsburgh & C. R. Co.*, 137 Pa. St. 575.

³⁵ *Pennison v. Chicago & C. R. Co.*, 93 Wis. 344; s. c. 4 Am. & Eng. R. Cas. (N. S.) 573; 67 N. W. Rep. 702. A railroad company, to which is transferred property of another railroad sold under execution, cannot be held liable for the *price* bid by the *purchaser* on the sale, where it never has anything to do with the money: *Kit-*

tel v. Augusta & C. R. Co., 78 Fed. Rep. 855.

³⁶ *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412; s. c. 35 L. R. A. 444; 5 Am. & Eng. Corp. Cas. (N. S.) 382; 68 N. W. Rep. 628; *Eureka Fire Hose Co. v. Good Will Fire Co. No. 2*, 7 Del. Co. Rep. (Pa.) 28; *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168; *Benesh v. Mill Owners Mut. & C. Ins. Co.*, 103 Iowa, 465; s. c. 72 N. W. Rep. 674; *Calumet Paper Co. v. Stotts Investment Co.*, 96 Iowa, 147 s. c. 64 N. W. Rep. 782. Compare *Grand River College v. Robertson*, 67 Mo. App. 327.

³⁷ *Austin v. Tecumseh Nat. Bank*, *supra*; *Calumet Paper Co. v. Stotts Investment Co.*, 96 Iowa, 147; *Benesh v. Mill Owners Mut. & C. Ins. Co.*, 103 Iowa, 465; s. c. 72 N. W. Rep. 674.

³⁸ *Austin v. Tecumseh Nat. Bank*,

bility upon the successor corporation, subject to which the reorganization took place.³⁹ 5. And it seems, where there has been a foreclosure sale, and the court, in its decree, imposes certain obligations of the old corporation upon the purchaser, who thereafter reorganizes a new corporation.⁴⁰ For example, a mutual fire insurance company, organized to obviate defects in the articles of another corporation of the same name, was held liable upon a policy issued by the latter, to the same extent as if it has issued it itself, even if the two companies were not identical, where the new company retained practically the same officers and membership as the old, acquired its assets, and adopted a resolution continuing the old policies in force until the new ones were issued, and providing that, if the holders, after notice of the change, did not elect to take new ones, the old ones should continue.⁴¹ So, a judgment for goods sold to a *de facto* corporation was deemed to be a judgment against a new corporation organized before its rendition to cure a defect in the incorporation of the old one, where the new organization took all the property and assumed all the liabilities of the old one.⁴²

§ 8277. Circumstances under which New Company Liable for New Business Transacted in Name of Old Company.—A corporation to which is transferred all the property of another corporation, whose stock is canceled, except three shares for the purpose of keeping up a nominal organization, is liable for the debts arising out of the business thereafter carried on, and cannot claim that it was carried on by the latter corporation.⁴³

supra; Hibernia Ins. Co. v. St. Louis &c. Trans. Co., 13 Fed. Rep. 516.

³⁹ Plainview v. Winona &c. R. Co., 36 Minn. 505, 516; Chicago &c. R. Co. v. Lundstrom, 16 Neb. 254; s. c. 20 N. W. Rep. 198; Western Pa. R. Co. v. Johnson, 59 Pa. St. 290 (charter provision making land damage a perpetual lien until paid). As to the liability of a successor railway corporation for damages for taking land, compare Campbell v. Pittsburgh &c. R. Co., 137 Pa. St. 574, 586; Chicago &c. R. Co. v. Hall, 135 Ind. 91; s. c. 23 L. R. A. 231 (where there is a valuable note on the liability of a consolidated railroad corporation for the debts of its predecessor).

⁴⁰ Campbell v. Pittsburgh &c. R. Co., 137 Pa. St. 574, 586.

⁴¹ Benesh v. Mill Owners Mut. &c. Ins. Co., 103 Iowa, 465; s. c. 72 N. W. Rep. 674.

⁴² Calumet Paper Co. v. Stotts Invest. Co., 96 Iowa, 147; s. c. 64 N. W. Rep. 782. That a corporation which absorbs or "takes over" all the business of another corporation, in whose name the former carries on business, is liable for acts done in the name of the latter,—see Davis Provision Co. v. Fowler Bros., 20 App. Div. (N. Y.) 626, 632; s. c. 47 N. Y. Supp. 205.

⁴³ Glidden &c. Varnish Co. v. Interstate Nat. Bank, 32 U. S. App. 654; s. c. 16 C. C. A. 534; 59 Fed. Rep. 912.

§ 8278. New Company Succeeds to what Rights of the Old.—

A grant to each of two corporations, of “ the powers, rights, and capacities ” which have been granted to a corporation which they succeed, whose property is divided between them, does not confer on the new companies the *exemption* which belonged to the original company from legislation changing the *rates of toll* which it might charge, so as to prevent the company from earning a stated minimum dividend on its capital stock.⁴⁴

⁴⁴ Covington &c. Turnp. Co. v. Sandford, 164 U. S. 578; s. c. 17 Sup. Ct. Rep. 198.

CHAPTER CCIX.

CONTRACTS AND FRAUDS OF PROMOTERS.

SECTION	SECTION
8282. Promoters are not agents of the future corporation.	future corporation for secret profits.
8283. Corporation may become liable for engagements of promoters by ratification or adoption.	8287. Cases to which the foregoing rule does not apply.
8284. Rights of the corporation with respect to the engagements of its promoters.	8288. Accounting for fraudulent over-issues of shares.
8285. Personal liability of promoters on their contracts.	8289. Liability of promoters for false representations.
8286. Promoters must account to the	8290. Other frauds of promoters.
	8291. Injunction against promoters for a nuisance.

§ 8282. Promoters Are not Agents of the Future Corporation.—

Those undertaking to organize a corporation are not in any sense its agents before it comes into existence; since, from the nature of things, an agent cannot be self-appointed, but must be appointed by an existing principal. They cannot affect it by their declarations or representations,¹ nor by their engagements made in its behalf;²

¹ United States Vinegar Co. v. Schlegel, 143 N. Y. 537; s. c. 62 N. Y. St. Rep. 826; 38 N. E. Rep. 729; 9 Nat. Corp. Rep. 382; Lynde v. Anglo-Italian Hemp Spinning Co., (1896) 1 Ch. 178; s. c. 73 Law T. Rep. 502; 65 L. J. Ch. (N. S.) 96; 3 Am. & Eng. Corp. Cas. (N. S.) 101.

² Davis v. Maysville Creamery Asso., 63 Mo. App. 477; Hecla Consol. Gold Min. Co. v. O'Neill, 47 N. Y. St. Rep. 211; s. c. 12 Ry. & Corp. L. J. 163; 19 N. Y. Supp. 592; s. c. aff'd, 67 Hun (N. Y.) 652; s. c. 51 N. Y. St. Rep. 436; 22 N. Y. Supp. 130; 23 Civ. Pro. (N. Y.) 143; s. c. aff'd, 148 N. Y. 724; Winters v. Hub Min. Co., 57 Fed. Rep. 287; Weatherford &c. R. Co. v. Granger, 86 Tex. 350; s. c. 24 S. W. Rep. 795; rev'g 23 S. W. Rep. 425; Davis & Rankin Bldg. &c. Co. v.

Hillsboro Creamery Co., 10 Ind. App. 42; s. c. 37 N. E. Rep. 549; Smith v. Parker, 148 Ind. 127; s. c. 45 N. E. Rep. 770; Davis v. Ravenna Creamery Co., 48 Neb. 471; s. c. 67 N. W. Rep. 436; 4 Am. & Eng. Corp. Cas. (N. S.) 191; Tift v. Quaker City Nat. Bank, 141 Pa. 550; Moore &c. Hardw. Co. v. Towers Hardw. Co., 87 Ala. 206; Buffington v. Bardon, 80 Wis. 635; Hecla Consol. Gold Min. Co. v. O'Neil, 47 N. Y. St. Rep. 211; McArthur v. Times Printing Co., 48 Minn. 319; Ruby-Chief Min. & Mill Co. v. Gurley, 17 Colo. 199; San Joaquin Land &c. Co. v. West, 94 Cal. 399; Pittsburg &c. Copper Co. v. Quintrell, 91 Tenn. 693; Oaks v. Cattaraugus Water Co., 50 N. Y. St. Rep. 922; Bradley Fertilizer Co. v. South Pub. Co., 4 Misc. (N. Y.) 172; rev'g s. c. 21 N. Y. Supp. 492. Compare

but such engagements become obligatory only in cases where it ratifies or adopts them, by express corporate action or by passive acquiescence, accepting the benefits, etc., as in other cases of ratification.

§ 8283. **Corporation May Become Liable for Engagements of Promoters by Ratification or Adoption.**— Although the promoters of an intended corporation are not its agents in such a sense as to bind it by their acts and engagements,³ yet it may become liable to make good those engagements by ratifying or adopting them;⁴ and this ratification or adoption may take place either by express corporate action, or by any of the other modes by which corporations ratify or adopt the unauthorized or officious acts of others made in their behalf,⁵—such as accepting the land or chattel contracted for, or other benefits of the engagement with knowledge of the fact of its having been made.⁶

§ 8284. **Rights of the Corporation with Respect to the Engagements of Its Promoters.**— The statement made by Vice-Chancellor Green, of New Jersey, that “no rights, legal or equitable, arise in favor of a corporation in respect of transactions, whether complete

Bridgeport &c. Co. v. Meader, 69 Fed. Rep. 225; s. c. 23 U. S. App. 705; 15 C. C. A. 694, decision by a divided court.

³ 1 *Thomp. Corp.*, § 480.

⁴ *Bruner v. Brown*, 139 Ind. 600; s. c. 38 N. E. Rep. 318; *Seymour v. Spring Forest Cemetery Asso.*, 144 N. Y. 333; s. c. 26 L. R. A. 859; 63 N. Y. St. Rep. 672; 39 N. E. Rep. 365; *Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. Rep. 491; *Burden v. Burden*, 8 App. Div. (N. Y.) 160; s. c. 40 N. Y. Supp. 499.

⁵ *Huron Printing &c. Co. v. Kittleston*, 4 S. Dak. 520; s. c. 57 N. W. Rep. 233.

⁶ *Arapahoe Invest. Co. v. Platt*, 5 Colo. App. 515; s. c. 39 Pac. Rep. 584; *Rogers v. New York &c. Land Co.*, 134 N. Y. 197; s. c. 48 N. Y. St. Rep. 263; 32 N. E. Rep. 27; *Bridgeport Electric &c. Co. v. Meader*, 72 Fed. Rep. 115; s. c. 18 C. C. A. 451; 30 U. S. App. 580; *Schreyer v. Turner Flouring Mills Co.*, 29 Or. 1; s. c. 43 Pac. Rep. 719. The president of a corporation, who is its

general manager, has authority to adopt and ratify a contract made by himself for the corporation before it was legally created, for the performance of services for the company, which he would have power to engage if no previous contract existed: *Oakes v. Cattaraugus Water Co.*, 26 L. R. A. 544; s. c. 143 N. Y. 430; 62 N. Y. St. Rep. 445; 39 Cent. L. J. 510; 38 N. E. Rep. 461; 47 Am. & Eng. Corp. Cas. 251; 10 Am. R. & Corp. Rep. 611. The requirement of a statute that thirty days' notice must be given to the stockholders of a corporation before its property can be mortgaged does not apply to an equitable mortgage created by a contract with promoters and adopted by the corporation: *Bridgeport Electric &c. Co. v. Meader*, 72 Fed. Rep. 115; s. c. 18 C. C. A. 451; 30 U. S. App. 580. Circumstances under which a corporation may adopt a previous engagement made by its promoters, varying its terms: *Davis v. Dexter Butter &c. Co.*, 52 Kan. 693; s. c. 35 Pac. Rep. 776.

or inchoate, merely because entered into in contemplation of the creation of such corporation," cannot possibly be the law.⁷ Certainly, it has the right or option to make the engagements of its promoters, made in its behalf, its own by ratification or adoption.⁸ The statement of doctrine may be sound if properly understood. For example, the fact that a promoter may purchase with his own money, property with the intention of selling it to the corporation at a profit, does not make the property that of the corporation in equity; in other words, he does not hold as trustee for the corporation. It is his property; but when he undertakes to sell it to the corporation, he is charged, as its fiduciary, with the duty of making a full and fair disclosure of what he gave for it, under a principle already stated.⁹ Nor has a corporation the right to keep property unlawfully acquired for it by its promoters.¹⁰

§ 8285. Personal Liability of Promoters on Their Contracts.—

The promoters of a corporation are personally liable for debts which they assume to contract in its name and behalf before it has acquired a *de facto* organization such as cannot be attacked except by the State.¹¹ And if the governing statute prescribes a condition precedent to corporate existence, such as the filing of articles of incorporation, they are personally liable for engagements which they have assumed to make in the name of the supposed corporation before that condition has been fulfilled.¹² So, if they assume to make contracts in the name of the proposed corporation and then voluntarily abandon their purpose of forming it, they become personally liable to make good those contracts, and each becomes liable to make good such as he has directly or indirectly authorized or ratified.¹³ So, the promoters of a corporation are liable person-

⁷ Claquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219, 230; s. c. 27 Atl. Rep. 1094. App. 260; Colorado &c. Co. v. Adams, 5 Colo. App. 190, 201; Hersey v. Tully, 8 Colo. App. 110.

⁸ 1 Thomp. Corp., § 480.

⁹ Re Hess Man. Co., 23 Can. S. C. 644; aff'g s. c. 21 Ont. App. 66.

¹⁰ A corporation and its stockholders, to which *municipal property*, donated to its promoters in consideration of the erection of a factory, is transferred, are not innocent holders, but are liable to the municipality for such property: Kent v. Dithridge &c. Co., 1 Ohio C. P. 107; s. c. 10 Ohio C. C. 629.

¹¹ McLennan v. Hopkins, 2 Kan.

¹² Wechselberg v. Flour City Nat. Bank, 64 Fed. Rep. 90; s. c. 26 L. R. A. 470; 12 C. C. A. 56; Queen City Furniture &c. Co. v. Crawford, 127 Mo. 356; s. c. 30 S. W. Rep. 163; McLennan v. Hopkins, 2 Kan. App. 260.

¹³ Roberts Man. Co. v. Schlick, 62 Minn. 332; s. c. 64 N. W. Rep. 826; Hersey v. Tully, 8 Colo. App. 110; s. c. 44 Pac. Rep. 854; McLennan v. Anspaugh, 2 Kan. App. 269; s. c. 41 Pac. Rep. 1063.

ally for material purchased by one elected by them as superintendent and general manager, necessary for the proposed business, where they procured a charter in which they were named as directors for the first year, and as such directors elected themselves officers, but no *bona fide* subscription of stock, or arrangements for the payment of debts or liabilities were ever made.¹⁴ So, although there may be a corporation in existence for which work is being done, it is quite possible that the person contracting to do such work may not be aware of that fact, and may contract with its promoters *as individuals*, so as to make it a *question of fact for a jury* whether the contract is the contract of the individuals as partners, or of the corporation.¹⁵ With regard to the liability of one promoter for the engagements of others made in the name of the corporation before it has been brought into existence, a person who signs articles of incorporation which are filed for record and recorded, may be liable as a partner for permitting the use of his name as an officer of the corporation by other signers of the articles who, without being legally incorporated, carry on business in the assumed name of the corporation, where he has knowledge of such use of his name, or is guilty of negligence in not knowing it.¹⁶

§ 8286. Promoters Must Account to the Future Corporation for Secret Profits.—Although the promoters of a corporation are not its *agents* for the purpose of binding it by their acts and engagements,¹⁷ yet they are its *fiduciaries*: they occupy such a relation of trust and confidence towards the body which they are calling into existence,—or, more properly speaking, towards those whom they invite to join them in the intended enterprise by becoming members of such body,—as requires the same good faith on their part which

¹⁴ Whetstone v. Crane Bros. Man. Co., 1 Kan. App. 320; s. c. 41 Pac. Rep. 211.

¹⁵ Rust-Owen Lumber Co. v. Wellman, 10 S. Dak. 122; s. c. 72 N. W. Rep. 89.

¹⁶ Wechselsberg v. Flour City Nat. Bank, 26 L. R. A. 470; s. c. 64 Fed. Rep. 90; 12 C. C. A. 56. Construction of a statute creating an individual liability for omitting the word "limited" from the corporate name: Lehman v. Knapp, 48 La. Ann. 1148; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 476; 20 South. Rep. 674. It is needless to say that a promoter can-

not be held liable for engagements *made by his associates* with which he had no part, in behalf of the corporation, where all the necessary steps to bring it into existence have been taken: Railroad Gazette v. Wherry, 58 Mo. App. 423. Circumstances under which a defective acknowledgment of the articles of incorporation do not make the promoters liable for a purchase of land made in behalf of the intended corporation: Shields v. Clifton Hill Land Co., 26 L. R. A. 509; s. c. 94 Tenn. 123; 28 S. W. Rep. 668.

¹⁷ 1 Thomp. Corp., § 480.

the law exacts of the directors of corporations and all other fiduciaries. They are trustees in a sense which disables them from taking to themselves a *secret profit* made out of their trust to the detriment of the future corporation or its members; but they will be required to account for such profit to the corporation, or to its shareholders, or to its receiver or other representative in insolvency proceedings.¹⁸ The foregoing principle requires two things on the part of the promoter: 1. In organizing the intended corporation, to see that it is provided with a board of directors which, in dealing with him, will act faithfully for the company, and not for him. 2. To make a full and fair disclosure to such directors of his interest, and of the facts which the corporation ought to know before entering into the intended contract.¹⁹ If — as happened in several of the foregoing cases — there was not only not a full and fair disclosure, but affirmative misrepresentation, fraud and deceit,—then not only the promoter, but other persons as well, who stand in no fiduciary relation towards the corporation or its members, but who concur, with knowledge of the fraud, with the promoter in carrying out his fraudulent scheme, will become liable to the corporation for what it has lost thereby.²⁰ Upon the question what will be a full and fair disclosure to satisfy this rule, it has been held that the mere statement in a prospectus inviting subscriptions to the stock of a corporation, of the date and parties to an agreement by which a seller of property taken by the corporation, offers the promoters a certain sum for the formation of the company, is a sufficient disclosure.²¹ To enable the corporation to sue and recover the secret profits thus made by a promoter, no offer to rescind is neces-

¹⁸ Central Land Co. v. Obenchain, 92 Va. 130; s. c. 22 S. E. Rep. 876; Re Hess Man. Co., 23 Can. S. C. 644; aff'g s. c. 21 Ont. App. 66; Woodbury Heights Land Co. v. Loudenslager, 55 N. J. Eq. 78; s. c. 35 Atl. Rep. 436; Ex-Mission Land & Co. v. Flash, 97 Cal. 610; s. c. 32 Pac. Rep. 600; Paducah Land & Co. v. Mulholland, 15 Ky. L. Rep. 22; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101; s. c. 25 L. R. A. 90; 29 Atl. Rep. 303; Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; s. c. 27 Atl. Rep. 1094; Burbank v. Dennis, 101 Cal. 90; s. c. 44 Am. & Eng. Corp. Cas. 676; 35 Pac. Rep. 444; Fountain Spring Park Co. v.

Roberts, 92 Wis. 345; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 95; 66 N. W. Rep. 399; Krohn v. Williamson, 62 Fed. Rep. 869; s. c. 32 Ohio L. J. 301; Pittsburg Min. Co. v. Spooner, 74 Wis. 307; South Joplin Co. v. Chase, 104 Mo. 572.

¹⁹ Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; s. c. 27 Atl. Rep. 1094. See, to the same effect, Re Hess Man. Co., 23 Can. S. C. 644; aff'g s. c. 21 Ont. App. 66.

²⁰ Fountain Spring Park Co. v. Roberts, 92 Wis. 345; s. c. 66 N. W. Rep. 399; 3 Am. & Eng. Corp. Cas. (N. S.) 95.

²¹ Re Sale Hotel &c., 78 Law T. Rep. 368; rev'g s. c. 77 Law T. Rep. 681.

sary; and this, although the property which the corporation was induced to purchase was worth as much or more than was paid for it.²² It is scarcely necessary to close this statement of doctrine with the further observation that arrangements by which promoters get secret advantages or profits from the corporation will not be judicially enforced,²³ especially where the rights of innocent third persons have intervened.²⁴ The Supreme Court of Canada reason that a sale to a corporation by its promoter through a board of directors not independent of him may be rescinded, if the property remains in such a position that the parties may be restored to their original status.²⁵ But it is submitted the principles of equity do not require a court to be sedulous to put such a rascal *in statu quo*.

§ 8287. Cases to which the Foregoing Rule Does not Apply.—

As in the case of directors, the thing which the rule condemns is the taking of *secret* profits by the promoter from the corporation which he promotes. It does not inhibit the taking of *open* profits. It does not prevent a promoter from buying property, and then organizing a corporation and selling the property to the corporation at a profit to himself, so that he does it fairly and openly, and so that there is a body representing the corporation independently of himself with whom he may deal,— a body acting independently for the corporation, and not merely his own dummies.²⁶ For example, after a corporation has been organized for a considerable length of time, one who was its promoter and who holds a majority of its shares, may transfer property to it in exchange for its shares, if he deals with it at arm's length and does not take undue advantage of his position as a majority stockholder to influence its directors.²⁷ In such a case, so long as he deals with it fairly, he may deal with it as a stranger, just as any other stranger may.²⁸ In

²² Yale Gas Stove Co. v. Wilcox, 64 Conn. 101; s. c. 25 L. R. A. 90; 29 Atl. Rep. 308. Circumstances under which a judgment setting aside a purchase-money mortgage from a corporation to its promoters need not rescind the sale and restore the land: Ex-Mission Land & Co. v. Flash, 97 Cal. 610; s. c. 32 Pac. Rep. 600.

²³ Yale Gas Stove Co. v. Wilcox, 64 Conn. 101; s. c. 25 L. R. A. 90; 29 Atl. Rep. 308.

²⁴ Dillon v. Commercial Cable Co., 87 Hun (N. Y.) 444; s. c. 34 N. Y. Supp. 370.

²⁵ Re Hess Man. Co., 23 Can. S. C. 644; aff'g s. c. 21 Ont. 66.

²⁶ Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219; s. c. 27 Atl. Rep. 1094.

²⁷ Russell v. Rock Run Fuel Gas Co., 184 Pa. St. 102; s. c. W. N. C. (Pa.) 364; 39 Atl. Rep. 21; 7 Am. & Eng. Corp. Cas. (N. S.) 456.

²⁸ For a case where it was held that persons sought to be charged as promoters for a profit made out of the corporation, were not liable because they were not promoters.—see Re Olympia, 78 Law T. Rep. 159, a case

this, as in other cases,²⁹ the corporation ought to disaffirm promptly, or at least within a reasonable time after learning the facts which the promoter concealed from it.³⁰ Nor has the principle any application where the corporation, with full knowledge of all persons interested, elects to *affirm* the arrangement.³¹

§ 8288. Accounting for Fraudulent Overissues of Shares.—

A promoter who makes a fraudulent overissue of shares to himself, and who sells them to innocent persons, may be compelled to account with respect to them with his associates.³²

§ 8289. Liability of Promoters for False Representations in Procuring Share Subscriptions.—If the promoters of a corporation put forth a false prospectus or other false statement, intended to induce members of the public to become the purchasers of shares in the corporation, and any member of the public is thereby deceived to his damage, he has a right of action against the authors of the falsehood for damages, on the footing of *deceit*. An action *ex contractu* will not lie; nor will the purchaser of a judgment rendered against the corporation be able to maintain such an action, unless he can show that he was induced by the fraudulent representations to become the purchaser of the judgment.³³ This right of action has been placed upon the supposed fiduciary relation existing between the promoters and those whom they solicit to become shareholders in the corporation, and the consequent obligation on the part of the promoters to exercise the utmost good faith towards the latter.³⁴ But the existence of a fiduciary relation is not at all necessary to support the right of action. If A. is defrauded by B.

which does not seem to have been correctly decided. See also *Re Wragg*, (1897) 1 Ch. 796; s. c. 66 L. J. Ch. (N. S.) 419; 75 Law T. Rep. 652; 76 Law T. Rep. 397.

²⁹ *Post*, § 8440.

³⁰ It has been held, that a corporation waives the right to assail a purchase of land for it by one of its promoters, on the ground that he was an agent for the vendor, by failing to raise any objection for more than *six months* after learning of the fraud: *Blood v. La Serena Land & Co.*, 113 Cal. 221; s. c. 41 Pac. Rep. 1017.

³¹ A "syndicate" contract giving certain stockholders a bonus will not be declared fraudulent and void as

against other stockholders in the corporation, where the corporation, with the full knowledge and approval of such stockholders, has settled the matter and put the settlement in its constitution, and has received a substantial benefit from it: *Buker v. Leighton Lea Asso.*, 18 App. Div. (N. Y.) 548; s. c. 46 N. Y. Supp. 35.

³² *Huiskamp v. West*, 47 Fed. Rep. 236.

³³ *Haines v. Franklin*, 87 Fed. Rep. 139; s. c. 15 Lanc. L. Rev. (Pa.) 209.

³⁴ *Walker v. Anglo-American Mortgage & Co.*, 72 Hun (N. Y.) 334; s. c. 55 N. Y. St. Rep. 54; 25 N. Y. Supp. 432.

to his loss, he may recover damages for the deceit although they dealt with each other at arm's length.

§ 8290. **Other Frauds of Promoters.**—Where promoters, by falsely representing to the *owner of property* that improvements of great value will be placed upon the property and paid for, induce him to convey the property to the corporation and to accept in part payment second mortgage bonds of the corporation, so as to let in as a first lien first mortgage bonds which are held by themselves, and issue to themselves shares in the corporation for which they pay nothing,—they will not be allowed to assert the lien of the first mortgage in priority to the second mortgage.³⁵ Where promoters, by various devices, cause shares of stock in the corporation to be issued and assigned to themselves as full-paid, in consideration of property acquired by the corporation, when in fact the property has not been paid for by the shares, and the promoters also hold bonds on the corporate estate secured by a first mortgage,—they will not be allowed to recover from the corporation as first mortgage bondholders without paying what is due from them to the corporation as shareholders, if the rights of one who sold the property to the corporation are thereby put in jeopardy.³⁶ One promoter, in such a case, is affected by the fraud of another in making the guaranty that the money placed in his hands will be used in putting improvements upon the property.³⁷ In such a case, a promoter of a corporation who has not paid his stock subscription will not be permitted to take an assignment of a claim for improvements made on the corporate property, so as to enforce the same in priority to valid mortgages on such property.³⁸ Statutes already considered,³⁹ making “officers” of corporations liable for making false certificates or public notices, do not apply to the case where a false certificate is made by an *incorporator* to bring the corporation into being; since, until the corporation is brought into existence, it has no “officers.”⁴⁰

³⁵ *Hooper v. Central Trust Co.*, 81 Md. 559; s. c. 29 L. R. A. 262; 32 Atl. Rep. 505.

³⁶ *Hooper v. Central Trust Co.*, 81 Md. 559; s. c. 29 L. R. A. 262; 32 Atl. Rep. 505.

³⁷ *Hooper v. Central Trust Co.*, 81 Md. 559; s. c. 29 L. R. A. 262; 32 Atl. Rep. 505.

³⁸ *Hooper v. Central Trust Co.*, 81 Md. 559; s. c. 29 L. R. A. 262; 32 Atl. Rep. 505.

³⁹ 3 *Thomp. Corp.*, § 4240, *et seq.*
⁴⁰ *Thomson-Houston Electric Co. v. Murray*, 60 N. J. L. 20; s. c. 37 Atl. Rep. 443.

§ 8291. Injunction against Promoters for a Nuisance.— A *continuing nuisance*, such as the unlawful occupation of a street by a railway company, will not authorize an injunction against the promoters of the company, where the company has been duly incorporated, although the nuisance may have been commenced by the promoters; but the injunction, if any, should be against the corporation.⁴¹

⁴¹ Dieter v. Estill, 95 Ga. 370; s. c. 22 S. E. Rep. 622.

TITLE TWENTY-ONE.

RECENT DECISIONS ON THE FRANCHISES,
POWERS AND LIABILITIES OF
CORPORATIONS.

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CHAPTER

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CHAPTER CCX.

FRANCHISES, POWERS, PRIVILEGES.

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§ 8294. **What is a Franchise?**—A franchise is said to be a special privilege emanating from the sovereign power and owing its existence to a grant or to a prescription presupposing a grant.¹ The word “franchise” is frequently applied (or misapplied) so as to designate a mere *license*, given, for example, by a municipal corporation to a street railway company, or a water supply company, to occupy its public streets for their corporate purposes. It is also misapplied by a private corporation known as the Associated Press, by using it to designate the right which, for a consideration, they confer on the proprietors of some newspapers, and deny to others, of receiving their news reports. But it is essential to the legal idea of a franchise that it should be a special privilege emanating from sovereign authority. Blackstone defines it as “a royal privilege or branch of the king’s prerogative subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king’s grant.”² It was said by Mr. Chief Justice Taney, speaking for the Supreme Court of the United States, that “it is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State.”³ In his separate opinion in *West River Bridge Company v. Dix*,⁴ Mr. Justice Woodbury, citing the *Dartmouth College* decision, and other cases, used the following bungling expression: “I concur in the views that a corporation created to build a bridge like that of the plaintiffs in error, is itself, in one sense, a franchise.” The bridge was a toll bridge. On the contrary, it has been said that “it is not the franchises that constitute, or the conferring of franchises that create a corporation. ‘The artificial person called a corporation is composed of natural persons, and the law deems it to be first brought into existence, and then clothes it with the granted franchises and properties.’”⁵

¹ *Wilmington Water Power Co. v. Evans*, 166 Ill. 548; s. c. 46 N. E. Rep. 1083; *Board of Trade v. People*, 91 Ill. 80, 82. For similar definitions, see *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 595; *Morgan v. Louisiana*, 93 U. S. 217; *Bridgeport v. New York & C. R. Co.*, 36 Conn. 255, 266; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358.

² 2 Bla. Com. 37. See *Chicago City*

R. Co. v. People, 73 Ill. 541, where this definition was adopted.

³ *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 595. See also *Bridgeport v. New York & C. R. Co.*, 36 Conn. 255.

⁴ 46 How. (U. S.) 507.

⁵ *Huff v. Winona & C. R. Co.*, 11 Minn. 180, 192; citing *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 691.

§ 8295. **Franchises Emanate from the State Alone.**—The consent of a *municipality* to the exercise of a franchise contained in a charter, cannot enlarge the franchise, nor does the failure to obtain it diminish it.⁶

§ 8296. **Doctrine that Franchises Remain in Abeyance until the Corporation Comes into Existence, and then Immediately Vest in It.**—Among the subtleties of the Dartmouth College decision, worthy of the Middle Ages, was the following reasoning of Mr. Justice Story: “When * * * the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done; and when the corporation is brought into life, the franchises instantaneously attach to it.”⁷ “* * * I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, it is as much an executed contract as if its prior existence had been established for a century.”⁸ Commenting on the first sentence in the above quotation, Judge Archer, in his dissenting opinion in the great case of Chesapeake &c. Canal Co. v. Baltimore &c. R. Co.,⁹ expressed the opinion that the word “abeyance,” as thus used by Mr. Justice Story, was not used in the technical sense of the word, but as synonymous with the word “suspended;” and such we understand to be the technical meaning of the word “abeyance.” The following judicial casuistry has been cited with approval: “The artificial person called a corporation is composed of natural persons, and the law deems it first to be brought into existence, and then clothes it with the granted franchises and property.”¹⁰ “Corporate franchises,” said Mr. Justice Clifford, in giving the opinion of the court, “are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but

⁶ Re Philadelphia Gas Works Co., (Exec. Dept.) 1 Dauph. Co. Rep. (Pa.) 55.

⁷ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 691.

⁸ Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 693; quoted in Vincennes University v. In-

diana, 14 How. (U. S.) 268, 274-275; People v. Wren, 5 Ill. 269, 280; Williams v. State, 23 Tex. 264, 286-287.

⁹ 4 Gill & J. (Md.) 1, 191.

¹⁰ Huff v. Winona &c. R. Co., 11 Minn. 180, 192; citing Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 691.

powers coupled with an interest, which vest in the corporation upon the possession of its franchises; and, whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchises.”¹¹

§ 8297. Corporation how far Governed by the Law of the State of its Creation.— “A corporation is a creature of law. It is always subject to the law of its charter; or, if it has no special charter, then to the incorporation laws of the State or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case, regard must primarily be had to the laws of the State or sovereignty from which it has derived its franchises. * * * Conceding that the laws of a State do not have any extra-territorial force *as mere laws*, nevertheless the general rule is that *things done in one State, in pursuance of the laws of that State, are to be regarded as valid and binding in other States.*”¹²

§ 8298. General Rules for the Interpretation of Grants of Power to Corporations.— A corporation is a mere creature of law, and has only such powers as are expressly granted by the State, or as are necessary to carry into effect the powers expressly granted.¹³ In other words, it possesses no rights and can exercise no powers which are not expressly given, or to be necessarily implied.¹⁴ A grant of power to it is to be *strictly construed* against it.¹⁵ Every

¹¹ Society for Savings v. Coite, 6 Wall. (U. S.) 594, 606; citing Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 700. See also Pennsylvania College cases, 13 Wall. (U. S.) 190, 212, where the same passage is cited by the same learned judge.

¹² American Water Works Co. v. Farmers' Loan & Co., 20 Colo. 203; s. c. 25 L. R. A. 338; 37 Pac. Rep. 269, per Elliott, J.; citing Canada Southern R. Co. v. Gebhard, 109 U. S. 527, and Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 585.

¹³ 4 Thomp. Corp., § 5345; Weyeth Hardware & Co. v. James-Spencer-

Bateman Co., 15 Utah, 110; s. c. 47 Pac. Rep. 604.

¹⁴ Stockton v. Central R. Co., 50 N. J. Eq. 52; s. c. 17 L. R. A. 97; 12 Ry. & Corp. L. J. 194; 51 Am. & Eng. R. Cas. 1; 24 Atl. Rep. 964; Rabe v. Dunlap, 51 N. J. Eq. 40; s. c. 40 Am. & Eng. Corp. Cas. 220; 25 Atl. Rep. 959.

¹⁵ Pearsall v. Great Northern R. Co., 161 U. S. 646; s. c. 40 L. ed. 838; 16 Sup. Ct. Rep. 705; rev'g s. c. 73 Fed. Rep. 933; American Loan & Co. v. Minnesota & Co. R. Co., 157 Ill. 641; s. c. 42 N. E. Rep. 153; 28 Chi. Leg. News 99; Louisville & Co. R. Co. v. Kentucky, 161 U. S. 677, 685; s.

power that is not clearly granted to it is withheld, and any *ambiguity* in the terms of the grant must operate against it and in favor of the public,¹⁶ and any *doubt* arising out of the language employed in the grant must be construed in favor of the State or the public.¹⁷ An *enumeration* of its powers in its charter implies the *exclusion* of all other powers.¹⁸ This rule of interpretation was thus strongly stated by Mr. Justice Swayne in language which the court has since repeated: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."¹⁹ "Hence," say the court in a later case, "an exclusive right to enjoy a franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed."²⁰ But all this is consistent with the rule that whatever may fairly be regarded as incidental to and consequential upon those things which are authorized by a charter will not be held by judicial construction to be *ultra vires*, unless expressly prohibited.²¹ From this it follows that an act lawful in itself, and not otherwise prohibited, which is done for the purpose

c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714; aff'g s. c. 97 Ky. 675; 31 S. W. Rep. 476; *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287; *Morrill v. Smith County*, 89 Tex. 529, 552.

¹⁶ *American Loan &c. Co. v. Minnesota &c. R. Co.*, 157 Ill. 641; s. c. 42 N. E. Rep. 153; 28 Chi. Leg. News, 99.

¹⁷ *Illinois Health University v. People*, 166 Ill. 171; s. c. 46 N. E. Rep. 737; *Louisville &c. R. Co. v. Kentucky*, 161 U. S. 677; s. c. 40 L. ed. 849; 16 Sup. Ct. Rep. 714.

¹⁸ *Powell v. Murray*, 3 App. Div. (N. Y.) 273; s. c. 73 N. Y. St. Rep. 851; 38 N. Y. Supp. 233.

¹⁹ *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666; again quoted with approval by Mr. Justice Brown in giving the opinion of the court in

Pearsall v. Great Northern R. Co., 161 U. S. 646, 664.

²⁰ *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664. opinion by Mr. Justice Brown. "This principle," added the learned Justice, "was laid down at an early day in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, and has been steadily adhered to ever since;" citing *Turnpike Co. v. State*, 3 Wall. (U. S.) 210; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75. See also *Bank of Chillicothe v. Chillicothe*, 7 Oh., Pt. I, 31, 36; s. c. 30 Am. Dec. 185, 187; *Richmond &c. R. Co. v. Richmond*, 26 Gratt. (Va.) 83, 95; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810, 824.

²¹ *Ellerman v. Chicago Junction R. &c. Co.*, 49 N. J. Eq. 217; s. c. 11

of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial and not in a remote and fanciful sense, is not *ultra vires*.²² Moreover, the rule of strict construction is said not to apply in a case where the corporation seeks to repudiate contracts the benefit of which it has enjoyed, or where such contracts are attacked by its creditors after it has become insolvent.²³

§ 8299. Grants of Franchises Restrained to the Life of the Corporation.—There are decisions which hold that municipal corporations may grant to private corporations so-called franchises, but really *licenses* to use their streets for periods longer than the period of life which the State has vouchsafed to the corporation itself.²⁴ Instead of formulating or illustrating any sound principle, these decisions seem rather to illustrate the extent to which the courts have been influenced by private corporations.²⁵ A better view is that a franchise granted to a particular corporation by a municipal corporation, to occupy one of its streets for the purposes for which the corporation was chartered, expires with the life of the corporation.

§ 8300. Corporations Subject to Public Visitation and Inspection.—A private corporation is not made a public one by the mere fact that it is subject to visitation and inspection by public officials.²⁶ The soundness of this proposition cannot be denied, but it would take a long explanation to show the limits within which it must be understood.²⁷ The Dartmouth College case was cited by the Superior Court of Delaware to the proposition that

Ry. & Corp. L. J. 97; 35 Am. & Eng. Corp. Cas. 388; 23 Atl. Rep. 287.

²² Steinway v. Steinway & Sons, 17 Misc. (N. Y.) 43; s. c. 40 N. Y. Supp. 718.

²³ Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47.

²⁴ People v. O'Brien, 111 N. Y. 1; s. c. 18 N. E. Rep. 692; Brown v. Duplessis, 14 La. 842. Compare New Orleans & C. R. Co. v. New Orleans, 143 U. S. 192; Railroad Co. v. Delaware, 114 U. S. 501; Detroit v. Detroit & C. R. Co., 43 Mich. 140; s. c. 5 N. W. Rep. 275; State v. Laclede Gas Light Co., 102 Mo. 472; s. c. 14 S. W. Rep. 974, and 15 S. W. Rep.

383; Des Moines Street R. Co. v. Des Moines & C. Street R. Co., 73 Iowa, 513; s. c. 33 N. W. Rep. 610; 35 N. W. Rep. 602; Grand Rapids & C. Co. v. Grand Rapids & C. R. Co., 33 Fed. Rep. 659; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 529; Richmond Gas Light Co. v. Middleton, 59 N. Y. 228.

²⁵ Detroit v. Detroit City R. Co., 64 Fed. Rep. 628; s. c. 26 L. R. A. 667; rev'g s. c. 56 Fed. Rep. 867; s. c. 56 Am. & Eng. R. Cas. 337, and 60 Fed. Rep. 161.

²⁶ Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153; s. c. 36 L. R. A. 55.

²⁷ See *ante*, § 8147.

civil corporations, whether public or private, are subject to the general law of the land and amenable to the judicial tribunals for the proper exercise of their powers. The court added: "In England the Court of King's Bench superintends all civil corporations, but in this State the Superior Court is invested with all the powers of the Court of King's Bench, in all manner of pleas, actions, suits and causes, and in the general administration of justice to all persons. There cannot, therefore, be a doubt as to the authority of this court to superintend this corporation, as well as all other civil corporations in this State; to correct abuses and to compel them to the due and proper exercise of their powers."²⁸ Some idea like the foregoing was in the mind of the Supreme Court of Georgia when, speaking through Brown, C. J., it said: "It was insisted in this case that the Georgia Medical Society was in existence long before it was incorporated, and that its objects were in no way changed by its application for, and acceptance of its present charter from the State. This may be very true; but its legal responsibilities were changed by the acceptance of its charter. While it remained a voluntary society, the courts had no jurisdiction over it if it violated no law of the State, and its members had no property in their membership which the law could protect. But its acceptance of the charter subjected it to the supervision of the proper legal authorities having jurisdiction in such cases." The court proceeded to show that in England the king had a visitorial power over *civil* as distinguished from *eleemosynary* corporations, which was exercised through the Court of King's Bench, and that this jurisdiction passed to the Superior Court of Georgia.²⁹

§ 8301. **Taxation in Aid of Private Manufacturing Corporations Unconstitutional.**—The erection and maintenance of a manufacturing establishment, while incidentally beneficial to the com-

²⁸ State v. Wilmington City Council, 3 Harr. (Del.) 294, 299. In this case it was held that the Superior Court of Delaware had power to send its mandamus to the city council of Wilmington, commanding them to judge according to law in the admission of corporate officers, though they were not judges of the election returns and of the qualifications of their officers.

²⁹ State v. Georgia Medical Society,

38 Ga. 608, 625-626; s. c. 95 Am. Dec. 408, 410; citing Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 674-675. The proposition that membership in voluntary associations is not within the protection of the law is certainly untenable. To the doctrine that corporations are amenable to the law of the land, see Bloodgood v. Mohawk &c. R. Co., 18 Wend. (N. Y.) 9, 51; s. c. 31 Am. Dec. 313, 348.

munity in which it is established, is not deemed a public object to the aid of which money raised by taxation can be appropriated. On the contrary, for the State to aid by taxation a private manufacturing corporation is deemed tantamount to putting its hand into the pocket of A. and taking out his money and giving it to B. for the private use and gain of B. Such taxation is condemned in a leading case as being contrary to those implied reservations of power which, independently of express constitutional provisions, are imposed upon the legislatures in free governments;³⁰ and the doctrine that the imposing of taxes for such a purpose is beyond the power of a State legislature is agreed to with great unanimity.³¹

§ 8302. Constitutional Validity of Taxation in Support of Indigent Patients in Private Incorporated Asylums.— Although it is a settled principle of American constitutional law³² that it is beyond the power of the State legislatures to lay and collect or authorize the laying and collection of taxes in aid of private objects or enterprises, yet where the question has been raised, a majority of the cases have held that a State legislature may authorize a county or municipal corporation to lay and collect taxes for the support of indigent patients in private incorporated asylums.³³ One court, in

³⁰ *Loan Asso. v. Topeka*, 20 Wall. (U. S.) 655.

³¹ *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. La Grange*, 113 U. S. 1; *Allen v. Jay*, 60 Me. 124; s. c. 11 Am. Rep. 185; *Weissmer v. Douglas*, 64 N. Y. 91; s. c. 21 Am. Rep. 586; *Opinion of the Judges*, 58 Me. 590; *Mather v. Ottawa*, 114 Ill. 659; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353; *Ottawa v. Carey*, 108 U. S. 110; *Coates v. Campbell*, 37 Minn. 498; *Attorney-General v. Eau Claire*, 37 Wis. 400; *Osborne v. Adams County*, 106 U. S. 181; *State v. Adams County*, 15 Neb. 569.

³² *Loan Asso. v. Topeka*, 20 Wall. (U. S.) 658.

³³ *Re House*, 23 Colo. 87; s. c. 33 L. R. A. 832; 46 Pac. Rep. 117; *Baltimore v. Keeley Institute*, 81 Md. 106; s. c. 27 L. R. A. 646; *White v. Inebriates' Home*, 141 N. Y. 123. For analogous decisions, see *State v. Seibert*, 123 Mo. 424 (donation of public moneys to private corporation for support of the insane upheld); *Shepherd's Fold v. New York*, 96 N. Y. 137

(upholding donation of public moneys to private asylum for support and education of orphan and friendless children). The so-called Michigan "Jag Cure Act" was held unconstitutional on the ground that it authorized unofficial persons to prescribe rules which should acquit persons charged with crime. Roughly speaking, the act provided that persons convicted of drunkenness might be released on condition that they would go into an inebriate asylum, obey the rules there in force for a stated period, etc.: *Senate of Happy Home Clubs v. Alpena County*, 99 Mich. 117; s. c. 23 L. R. A. 144. The Court of Appeals of Maryland have conceded that the power to contract with private charitable corporations, even though under the auspices of religious denominations, exists in the city of Baltimore; but holds that the power cannot be exercised unless the subject-matter of the contract be kept under the control and subject to the supervision of the municipal authority, so as to make the institutions

an energetic, though unsound opinion, has taken the contrary view, holding that, as drunkenness is not a contagious disease, a statute providing that habitual drunkards who are "pecuniarily unable to procure and pay for treatment for such disease," may be cured in a private inebriate asylum at the expense of the county, to be borne by the taxation of its inhabitants, is unconstitutional.³⁴ The court reason that the curing of drunkenness is not a public charity,—forgetting that drunkenness is the greatest known parent of crime, and that the inhabitants of the State are vitally interested in the suppression and diminution of crime. A similar statute was held invalid by the Supreme Court of Minnesota, not on any ground relating to taxation, but because it undertook to confer upon the probate judge a jurisdiction not warranted by the Constitution.³⁵ It is not necessary to suggest that the question does not turn on the fact of the recipient of the fund being a public or private corporation, but that it depends upon a solution of the inquiry whether the purpose for which it is intended is a public or a private one.³⁶ Thus, the constitutionality of laws authorizing taxation in aid of railroads, canals, turnpikes, etc., is generally upheld, although, in nearly all cases, the recipients of the bounty are private corporations organized for the pecuniary gain of their members.

§ 8303. Constitutional Validity of Taxation in Support of Railroads and Other Public Objects in the Hands of Private Corporations.— If the object is public, the fact that the corporation created to promote it is a private corporation organized for the pecuniary gain of its members, does not render void an act of the legislature under which the corporation is aided in the prosecution of its enterprise by public money raised by taxation.³⁷ Thus, it is settled by a great preponderance of judicial authority that a State legislature may, unless restricted by the provisions of the State Constitution, authorize towns, counties, or States either to subscribe for shares or bonds of railroad companies, or donate to such companies

contracted with, *pro hac vice*, municipal agencies: St. Mary's Industrial School v. Brown, 64 Md. 310.

³⁴ Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153.

³⁵ Foreman v. Hennepin County, 64 Minn. 371.

³⁶ Saint John's College v. State, 15

Md. 330, 375; Speer v. Blairsville, 50 Pa. St. 150; Sharpless v. Mayor, 21 Pa. St. 147, 169; St. Mary's Industrial School v. Brown, 45 Md. 310, 335.

³⁷ 1 Thomp. Corp., § 1115, *et seq.*; Sharpless v. Philadelphia, 21 Pa. St. 147 (leading case).

moneys raised by taxation, on the ground that the construction of railroads is a public use.³⁸ Among the corporations which may be so aided are turnpike companies;³⁹ plank road companies;⁴⁰ wagon bridge companies;⁴¹ companies organized to connect navigable waters so as to form a line of transportation;⁴² companies organized to erect and maintain public grist mills, whose tolls are subject to public regulation;⁴³ but not so as to steam grist mills which are organized as private manufacturing establishments.⁴⁴

§ 8304. Taxation in Aid of What Other Private Corporations Unconstitutional.—A town in Maine cannot lawfully devote money to a private *cemetery* corporation;⁴⁵ nor can a town in Wisconsin aid by taxation a private *educational* institution, though incorporated.⁴⁶

§ 8305. Effect of Repeal and Re-Enactment of an Enabling Act.—The repeal of a general incorporation law will not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under it, when the manifest purpose of the repealing act is to substitute a new statute extending the provisions of the old one, supplying its omissions and perfecting its details, without changing its general policy, or interfering with corporations formed under it.⁴⁷

³⁸ 1 Thomp. Corp., § 1115, *et seq.* See a numerous collection of cases supporting this doctrine in 14 L. R. A. 479.

³⁹ Commonwealth v. McWilliams, 11 Pa. St. 61.

⁴⁰ Mitchell v. Burlington, 4 Wall. (U. S.) 270; Larned v. Burlington, 4 Wall. (U. S.) 275.

⁴¹ United States v. Dodge County, 110 U. S. 156.

⁴² Goddin v. Crump, 8 Leigh (Va.) 120.

⁴³ Traver v. Merrick County, 14 Neb. 327; s. c. 45 Am. Rep. 111; State v. Clay County, 20 Neb. 452; Blair v. Cumming County, 111 U. S. 363; Burlington v. Beasley, 94 U. S. 310. This distinction in favor of

water power grist mills seems to be placed on the ground that the development of natural water power is an *internal improvement* in which the State has an interest.

⁴⁴ Osborn v. Adams County, 106 U. S. 181; State v. Adams County, 15 Neb. 568. A statute authorizing municipal corporations to pay bounties to volunteers has been held constitutional on the ground that it relates to a matter in which the *public have an interest*: Speer v. Blairsville, 50 Pa. St. 150.

⁴⁵ Luques v. Dresden, 77 Me. 186. ⁴⁶ Curtis v. Whipple, 24 Wis. 350; s. c. 1 Am. Rep. 187.

⁴⁷ Bibb v. Hall, 101 Ala. 79; s. c. 14 South. Rep. 98.

CHAPTER CCXI.

THE DOCTRINE OF ULTRA VIRES.

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§ 8308. **Foundation of the Doctrine of Ultra Vires.**—Citing previous decisions of the same court, it was said by Mr. Justice Gray in giving the opinion of the Supreme Court of the United States: "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."¹

§ 8309. **Persons Dealing with Corporations Bound to Take Notice of Their Powers.**— "When the corporation is created by a charter granted by the legislature, any person dealing with it is bound to take notice of the terms of the charter and of the general laws restricting or defining the powers of the corporation. * * * In like manner, when the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation, the extent of its corporate powers, and its capacity to act as a corporation."² This doctrine, in substance, is that persons dealing with corporations are charged with notice of the extent of their powers as delimited by the charter or statutes under which they are organized, and of any restrictions annexed to the grant;³ and are bound to know that the agents of the corporation cannot exercise any authority in excess of such powers.⁴

§ 8310. **And of the Powers of Their Contracting Officers and Agents.**—It is also a part of this extreme doctrine of *ultra vires* that persons dealing with corporations are bound to take notice of

¹ McCormick v. Market Nat. Bank, 165 U. S. 538, 549-550.

² McCormick v. Market Nat. Bank, 165 U. S. 538, 550; s. c. 41 L. ed. 817; 17 Sup. Ct. Rep. 433; opinion of the court by Mr. Justice Gray.

³ Smith v. Cornelius, 41 W. Va. 59; s. c. 30 L. R. A. 747; 23 S. E. Rep. 599.

⁴ Fitzhugh v. Franco-Texas Land Co., 81 Tex. 306; s. c. 16 S. W. Rep. 1078.

the provisions of the governing statute defining the *powers of the directors and other officers*.⁵ Cases are even found which go to the wild dream of holding that persons dealing with a corporation are bound to know the extent of the powers conferred upon the corporate agents through whom they deal, by the *by-laws* of the corporation.⁶

§ 8311. **Contrary Rule that Corporations are Bound by the Acts of Their Agents within the Limits of the Authority which They are Held out as Possessing, and the Public not Bound by Secret Instructions.**—Corporations, like natural persons, who hold their agents out to the public as possessed of certain authority, or who suffer their agents to hold themselves out to the public as possessed of certain authority, are bound, in favor of innocent persons, by the acts of such agents done in the professed behalf of the corporation within the scope of the authority so held out or professed.⁷

⁵ *Morris v. Griffith &c. Co.*, 69 Fed. Rep. 131; s. c. 34 Ohio L. J. 191; *Des Moines Man. &c. Co. v. Telford Milling Co.*, 9 S. Dak. 542; s. c. 70 N. W. Rep. 839.

⁶ *Edwards v. Carson Water Co.*, 25 Nev. 469, 483. In a recent case in Pennsylvania there is an aberration on this subject so gross as to deserve a passing notice. The treasurer of a corporation had assumed to execute a promissory note in its behalf. An auditor reported against the validity of the note, and the Supreme Court of the State affirmed a judgment rendered in conformity with his report, substantially for the reasons stated therein. Among other reasons of the auditor, was this:—A statute of that State (Pa. Act of April 29, 1874, § 5) provided that “the by-laws of every corporation created under the provisions of this statute, or accepting the same, shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the Constitution and laws of this Commonwealth, and the Constitution of the United States.” This says that the by-laws of every corporation shall be taken to be “its law”—not the law of other people. Yet the auditor construed the statute so as to make such by-laws the law of everybody. In his opinion the by-laws of a corpo-

ration “become written into the charter, and not only define and limit the rights, duties and powers of the officers *inter nos* (*sic*), but, so far as those with whom such corporation has dealings are concerned, put such parties upon notice in treating with such officers, as to the extent of their power and agency, whether the specific by-law has been brought home to them or not.” And this strange doctrine, seemingly sanctioned by the court, passed into the head-note of the case: *Re Millward-Cliff Cracker Co.*, 161 Pa. St. 157, 163; s. c. 28 Atl. Rep. 1072, 1077. Doubtless the case was correctly decided, but on the ground that the treasurer of a corporation is presumptively the officer appointed by its directors to preserve and disburse its funds, and not to bind it by contracts executed without the concurrence of its other officers; and on the further ground that the president of the bank taking the paper knew that the treasurer had no authority to execute it, and that he did it in fraud of the corporation.

⁷ *Martin v. Webb*, 110 U. S. 7, 14; *Cox v. Robinson*, 82 Fed. Rep. 277; s. c. 48 U. S. App. 388; 27 C. C. A. 120; *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277; s. c. 13 L. R. A. 559; 28 N. E. Rep. 245; *Loeb Foundry Co. v. Stout*, 61 Ill. App.

Under the operation of this principle, it is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or have been expressly given by a vote of the directors or stockholders, but such authority may be given by a general course of conduct and dealing, with the knowledge and implied assent of the directors.⁸ But this rule has no application where the act is wholly without the field of power of the corporation.⁹

§ 8312. **Public Not Bound by Corporate By-Laws in the Absence of Knowledge of Them.**—The by-laws of private corporations are private instruments for the government of their officers and agents, and for the regulation of their internal affairs. They are not public records, but are found only on the records of the corporation, to which the public have no access nor right of access. The courts do not take judicial notice of them, but they must be proved as facts. There is neither sense nor justice in the conclusion that third persons dealing with the corporation are bound to take notice of them, and, at their peril, to act in conformity with their provisions. The sound view is that where the corporation has power, and the officers or agents through whom

166; *National Bank v. Mattingly*, 18 Ky. L. Rep. 425; s. c. 33 S. W. Rep. 415; rehearing denied in 37 S. W. Rep. 953 (not to be off. rep.); *Crowley v. Genesee Mining Co.*, 55 Cal. 273; *McKiernan v. Lenzen*, 56 Cal. 61; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; s. c. 99 Am. Dec. 300; *Missouri Pacific R. Co. v. Simons*, 6 Tex. Civ. App. 621; *Fifth Ward Savings Bank v. First Nat. Bank*, 48 N. J. L. 513; *Hirschmann v. Iron Range &c. R. Co.*, 97 Mich. 384; *Greig v. Riordan*, 99 Cal. 316; *The Vigilancia*, 38 U. S. App. 563; s. c. 73 Fed. Rep. 452; *Oro Min. &c. Co. v. Kaiser*, 4 Colo. App. 219; s. c. 35 Pac. Rep. 677; *Metropole Building &c. Co. v. Garden City Fan Co.*, 50 Ill. App. 681; *Cone v. Empire Plaid Mills*, 12 App. Div. (N. Y.) 314; s. c. 42 N. Y. Supp. 160; *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 249; 42 N. E. Rep. 1097; *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 821; *Sparks v. Despatch Transfer Co.*, 104 Mo. 531; s. c. 12 L. R. A. 714; *Washing-*

ton Sav. Bank v. Butchers' &c. Bank, 107 Mo. 134; *Lee v. Pittsburgh Coal &c. Co.*, 56 How. Pr. (N. Y.) 373; *Bank of Batavia v. New York &c. R. Co.*, 106 N. Y. 195; s. c. 60 Am. Rep. 440; *Calvert v. Idaho Stage Co.*, 25 Or. 412; *Ceeder v. Loud & Sons' Lumber Co.*, 86 Mich. 541; *Davenport v. Stone*, 104 Mich. 521; s. c. 62 N. W. Rep. 722; *Washington v. Union Nat. Bank*, 99 Ill. 622; *Kraniger v. People's Bldg. Soc.*, 60 Minn. 94; s. c. 61 N. W. Rep. 904; *Dougherty v. Hunter*, 54 Pa. St. 380; *Carrigan v. Port Crescent Improv. Co.*, 6 Wash. 590; *Citizens' Nat. Bank v. Wintler*, 14 Wash. 558; s. c. 45 Pac. Rep. 38; *Hamm v. Drew*, 83 Tex. 77.

⁸ *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505; s. c. 9 Bkg. L. J. 450; 34 N. E. Rep. 1083. To the same effect, see *National Bank v. Mattingly*, 18 Ky. L. Rep. 425; s. c. 33 S. W. Rep. 415; rehearing denied in 37 S. W. Rep. 953 (not to be off. rep.).

⁹ *Towle v. American Bldg. Co.*, 78 Fed. Rep. 688.

it is acting in a given transaction* have presumptive power, to conclude it, the other contracting party is not bound to take notice of the provisions of the by-laws concerning the making of contracts and the incurring of obligations.¹⁰ Stated another way, the *apparent* authority of an agent of a corporation cannot be extended or restricted, as against a stranger, by by-laws of such corporation, in the absence of actual notice thereof.¹¹ Varying the statement of the doctrine still further, it may well be said that persons dealing with officers of corporations are only bound to know the legal power of the corporation to perform certain acts, and are not required to know that all the formalities required of the different officers in performance of their duties have been observed.¹² The rule has been extended even to the protection of the subordinate *employes* of the corporation. Thus, the *book-keeper* of a street railway employed by the president, is not bound by any by-laws of the company restricting the power of the president, of which he had no notice.¹³ Applying this principle, it has been held that if the directors of a bank permit an officer to hold himself out to the public as invested with absolute power to manage and control its affairs, in such a manner and for such a time as to lead innocent persons to conclude that such officer is authorized to make particular contracts, the bank cannot repudiate such a contract made with such officer by invoking a *by-law* which it has negligently allowed to fall into disuse.¹⁴ So, if the *president* of a corporation professing to act in its behalf, hires a man to prepare a pamphlet explaining a patent, which the corporation is organized to work under, the person so employed cannot be prevented from recovering compensation for such services by a by-law of which he has no knowledge.¹⁵ So, notice of the by-laws of a corporation restricting the right of any officer to make contracts of employment to a period less than one year, is not chargeable to one who makes a contract for services to the corporation with a general manager of the company, who has been given absolute charge of its business at the place of contract.¹⁶

¹⁰ Metropole Bldg. &c. Co. v. Garden City Fan Co., 50 Ill. App. 681.

¹¹ Johnston v. Milwaukee &c. Co., 46 Neb. 480; s. c. 64 N. W. Rep. 1100.

¹² Bosche v. Toledo Display Horse Co., 14 Ohio C. O. 289; s. c. 7 Ohio Dec. 374.

¹³ Trawick v. Pecria &c. R. Co., 68 Ill. App. 156.

¹⁴ Cox v. Robinson, 82 Fed. Rep. 277; s. c. 48 U. S. App. 388; 27 C. O. A. 120.

¹⁵ Powers v. Schlicht Heat &c. Co., 23 App. Div. (N. Y.) 380; s. c. 48 N. Y. Supp. 237.

¹⁶ Moyer v. East Shore Terminal Co., 41 S. C. 300; s. c. 25 L. R. A. 48; 19 S. E. Rep. 651.

§ 8313. **Customer Having Knowledge of Limitations upon Powers of Agent Deals with Him at his Peril.**—The foregoing principle presupposes that a third person dealing with a corporation has no knowledge of the limitation upon the power of the agent. Where he has such knowledge, and he nevertheless enters into a contract with the agent in his character of agent, he does so at his peril and takes his chances of the corporation ratifying or affirming the agent's act. For example, if a stranger to the corporation knows that certain securities have been deposited by the corporation with the cashier of a bank, and that the directors of the corporation making the deposit have passed a resolution that the notes should be held by the bailee subject to the *general* order of its president and treasurer, and he nevertheless takes them under an attempted pledge made by the president alone, he gets no title to them.¹⁷ So, a corporation whose notes and indorsements, executed by its *treasurer alone*, without the signature of its president as required by its by-laws, have been discounted by a bank, is not liable thereon, where the president of the bank knew that they were executed in fraud of the corporation, and procured their execution largely for his own purposes.¹⁸ So, a deed undertaking to convey corporate property, made by an officer without authority to make it, passes no title to one who takes the conveyance with knowledge of such want of authority.¹⁹

§ 8314. **Doctrine that Every Ultra Vires Act is Contrary to Public Policy and Void.**—There is a theory, now happily disappearing from American jurisprudence, that every act of a corporation in excess of its granted powers is an act in contravention of public policy, and for that reason to be held null and void.²⁰ The Supreme Court of the United States which, under the influence of Mr. Justice Gray, have revived the abominable doctrine of *ultra vires* in all its ancient strictness, have recently held, contrary to the doctrine of nearly all the State courts, that the fact that stock of another corporation could be lawfully acquired *under some*

¹⁷ *Tradesmen's Nat. Bank v. Manhattan Lumber Co.*, 46 N. Y. St. Rep. 487; s. c. 18 N. Y. Supp. 920.

¹⁸ *Re Millward-Cliff Cracker Co.*, 161 Pa. St. 157; s. c. 28 Atl. Rep. 1072, 1077.

¹⁹ *Kansas City Hay Press Co. v. Devol*, 27 Fed. Rep. 717.

²⁰ *Miller v. American Mut. &c. Ins. Co.*, 92 Tenn. 167; s. c. 20 L. R. A. 765; 22 Ins. L. J. 214; 21 S. W. Rep. 39; *Marble &c. Co. v. Harvey*, 92 Tenn. 115; s. c. 18 L. R. A. 252; *Elevator Co. v. Memphis &c. R. Co.*, 85 Tenn. 703; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598.

circumstances, does not estop a national bank from asserting that a transaction by which it did acquire such stock was *ultra vires*.²¹ This view necessarily precludes any right in either party to enforce the contract in a court of justice. But where one party to the contract has executed it on his part, and the other party has obtained the fruits of it, which he or it ought not, *ex aequo et bono*, to retain, the former may treat it as rescinded and sue to recover what the other party has received, or its value.²²

§ 8315. **Doctrine that the Assent of all the Shareholders does not Cure an Ultra Vires Act.**—A decision of the Supreme Court of Canada, in which different judges wrote separate opinions, has this syllabus: "A company incorporated for definite purposes has no power to pursue objects other than those expressed in the act or charter, or such as are reasonably incidental thereto. The assent of every shareholder makes no difference. The same is the case in respect to the powers exercisable by such a corporation in the attainment of authorized objects."²³ This cannot be relied on as expressing the American law.

§ 8316. **Distinction between an Entire Want of Power and a Misuse of Power.**—This distinction was stated and illustrated by Mr. Circuit Judge Jenkins in the following clear language: "An act is *ultra vires* a corporation when it is beyond and outside of the scope of the powers conferred by its founders,—when the corporation is without authority to perform it under any circumstances or for any purpose. Such acts are wholly void, and no contract for their performance can be enforced by or against the corporation, the plea of *ultra vires* being available to either party to the contract."²⁴ There are, however, acts done in excess of conferred powers, illegal as to shareholders, but for which the corporation is liable to innocent parties; as, for example, where a corporation is authorized to perform an act for a specific purpose and performs the act for another and unauthorized purpose. In such a case the plea of *ultra vires* is available to neither party.²⁵ In the case in hand,

²¹ California Bank v. Kennedy, 167 U. S. 362; s. c. 17 Sup. Ct. Rep. 831.

²² Miller v. American Mut. &c. Ins. Co., *supra*; Marble &c. Co. v. Harvey, *supra*; Mallory v. Hanauer Oil Works, *supra*.

²³ Charlebois v. Delap, 26 Can. S. C. 221, 238.

²⁴ "Such," said he, "was the character of the agreement in Thomas v. Railroad Co., 101 U. S. 71; Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24."

²⁵ "Such," said he, "was the character of the contracts under consideration in Gold Mining Co. v. National

no power is granted to purchase stock in another bank, and therefore a prohibition to do so may be implied.²⁶ It is not doubted, however, that, under the Banking Law of Indiana, the plaintiff in error had power to accept stock in another bank as security for a loan, or to acquire such stock by levy thereon and sale thereof, under execution to satisfy a debt due to it.²⁷ It had the power, therefore, under certain circumstances, and for certain purposes, to acquire stock in a national bank. It obtained the stock in question by purchase from a third party, and procured its transfer to itself upon the books of the national bank. The acquisition of such stock was within the general scope of its powers. The case is, therefore, one of an abuse of a general power, a wrongful exercise of conferred power, for purposes and under circumstances contrary to law, and not the case of the exercise of a power not in any event given. It is, therefore, related to the second class above noted, to which the doctrine of *ultra vires* does not apply. In all such cases a corporation cannot set up its own violation of law to escape the responsibility resulting from its illegal action.²⁸ The misuse of power in such cases is matter for consideration by the authorities of the State. If such abuse of power be prejudicial to the public, a forfeiture of the charter will furnish a preventive remedy. It would be grievous wrong to permit a corporation to assert its own abuse of power to escape liability under the facts here disclosed. It held the stock for many years, taking any profits accruing therefrom. It must meet the liability resulting from the failure of the bank. It cannot approbate and reprobate. It has received the benefits; it must bear the burdens. 'The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice, or work a legal wrong.'²⁹ It was accordingly held that, where a State bank had acquired stock in a national bank and held it for many years

Bank, 96 U. S. 640; Smith v. Sheeley, 12 Wall. (U. S.) 358; National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; National Bank v. Stewart, 107 U. S. 676; Fritts v. Palmer, 132 U. S. 282; Logan County Nat. Bank v. Townsend, 139 U. S. 67; Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240; Prescott Nat. Bank v. Butler,

157 Mass. 548; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543."

²⁶ Citing First Nat. Bank v. National Exchange Bank, 92 U. S. 122.

²⁷ Citing Morse Banks & Banking (2d ed.), 5; National Bank v. Case, 99 U. S. 628.

²⁸ Citing National Bank v. Case, *supra*.

²⁹ Quoting this from Railway Co. v. McCarthy, 96 U. S. 258, 267.

reaping the profits thereon, it could not, after the failure of the national bank, defend an action for an *assessment* on those shares on the ground of a want of power to purchase and hold them.³⁰

§ 8317. **When the Public May Rightfully Presume that a Corporate Act was Regularly Done.**—It is reasoned that the maxim *omnia praesumuntur esse rite acta, donec probetur in contrarium*, is applicable to everything done by a corporate officer; so that when one in good faith has advanced value on the belief of the regularity of the acts of a general agent of a corporation whose authority depends upon the compliance, by himself or other members or agents of the corporation, with preliminary regulations, the presumption of regularity against the corporation is conclusive.³¹ It follows that where an act of a corporation, which is challenged because of a failure to comply with some preliminary condition upon which the authority of those acting for the corporation is made by its charter or governing statute to depend, is seemingly regular, a stranger dealing with the corporation has the right, in the absence of notice to the contrary, to presume that the condition is complied with; and if he advances money on the faith of this presumption, he may hold the corporation notwithstanding any defect in the mode in which the power has been exercised.³² This is in conformity with the principle that when an agent is clothed with authority to act for his principal upon the happening of some extrinsic event peculiarly within the knowledge of the agent and not known to the public or within its usual means of knowledge, the fact that the agent acts is an implied representation, binding on his principal, in favor of those dealing in good faith with him as agent, that the extrinsic fact exists, which gives him, as between himself and his principal, the right to act.³³ Corporations were required by the general incorporation act of Tennessee of 1875, to accept, by a prescribed method, amendments to their charters proposed by subsequent statutes, or in default thereof, to wind up their affairs. A corporation remaining in business after the passage of a statute proposing a funda-

³⁰ Entire opinion in *Citizens' State Bank v. Hawkins*, 34 U. S. App. 423; s. c. 18 O. C. A. 78; 71 Fed. Rep. 369.

³¹ *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

³² *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

³³ *Louisville Trust Co. v. Louisville &c. R. Co.*, *supra*.

mental amendment to its charter and exercising the additional powers conferred by the amendment, will be conclusively presumed to have regularly accepted the amendment, and will be estopped to deny its acceptance as to those who have dealt with the corporation within the scope of the amendment, believing that such acceptance had taken place in due form.³⁴ The principle governing such a case is that the public may rightfully presume, in the absence of knowledge to the contrary, that the corporation has done what it ought to have done. As Gifford, L. J., well said: "A stranger must be taken to have read the general act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more; and, if he knows nothing to the contrary, he has a right to assume, as against the company, that all matters of internal management have been complied with."³⁵ Therefore, a contract executed by the accredited managers of a corporation in the general line of its business is binding upon it, especially when partially performed by it, notwithstanding a provision of its by-laws that no contract made by any of its officers or agents shall be valid unless authorized or ratified by its board of directors.³⁶

§ 8318. Doctrine of *Ultra Vires* not Allowed to Defeat Justice.—

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed where it would defeat the ends of justice or work a legal wrong."³⁷ That a corporation was exceeding its corporate powers does not prevent its recovery for damages sustained by the destruction of its property by a mob.³⁸ The want of corporate power to take an assignment of a cause of action cannot be interposed by a private person, as a defense to an action by a corporation as assignee of a claim for damages, but concerns the State alone.³⁹ In concluding his judgment in an

³⁴ Miller v. American Mut. &c. Ins. Co., 92 Tenn. 167; s. c. 20 L. R. A. 765; 22 Ins. L. J. 214; 21 S. W. Rep. 39.

³⁵ Re County Life Ass. Co., L. R., 5 Ch. 293.

³⁶ Hamilton Coal Co. v. Bernhard, 40 N. Y. St. Rep. 875; s. c. 16 N. Y. Supp. 55.

³⁷ Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506, 516; s. c. 50 Pac. Rep. 611; citing Railway Co. v. McCarthy, 96 U. S. 253, 267;

s. c. 24 L. ed. 693; Whitney Arms Co. v. Barlow, 63 N. Y. 62; s. c. 20 Am. Rep. 504; Chester Glass Co. v. Dewey, 16 Mass. 94; s. c. 8 Am. Dec. 128; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621.

³⁸ Spring Valley Coal Co. v. Spring Valley, 72 Ill. App. 629; s. c. rev'd on questions of procedure in 173 Ill. 497; s. c. 50 N. E. Rep. 1067; citing Ely v. Niagara County, 36 N. Y. 297.

³⁹ John V. Farwell Co. v. Wolf, 96 Wis. 10; s. c. 37 L. R. A. 138; 70

important case, where a railroad company had endeavored, under the plea of *ultra vires*, to evade contracts which it had induced a third party to enter into, Mr. Justice Brewer, at circuit, used these words: "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."⁴⁰

§ 8319. **Ultra Vires Contracts Enforceable which do not Involve Moral Guilt.**—A very liberal view of this subject is that a contract made by a corporation in excess of its granted powers, but which involves no moral guilt and which offends no express statute, is enforceable.⁴¹ Certainly the plea of *ultra vires* is not admitted as a defense to actions upon contracts of the above description where they have been *executed on one side*. The principle of estoppel cuts off such a defense.⁴²

§ 8320. **Contracts which are Immoral, Contrary to Public Policy, Forbidden by Constitutional or Statutory Law, not Enforceable.**—These stand on a totally different footing. In these cases the State is so strongly interested in preventing the making and enforcing of such contracts that the courts will, when called upon to enforce such a contract made by a corporation on the one side, or by two or more corporations among themselves, refuse to aid in its enforcement although it has been executed by the party seeking relief; but, in pursuance of the maxim *in pari delicto potior est conditio defendentis*, will leave the parties to the illegal contract where they have placed themselves, without regard to the hardships which may be thereby entailed. In plainer words, the sovereign does not furnish the machinery of justice to enable

N. W. Rep. 289; rehearing denied in 37 L. R. A. 142; 71 N. W. Rep. 109.

⁴⁰ Chicago & C. R. Co. v. Union Pac. R. Co., 47 Fed. Rep. 15, 30. This language is quoted by Mr. Chief Justice Fuller in affirming the judgment, in Union Pac. R. Co. v. Chicago & C. R. Co., 163 U. S. 564, 604.

⁴¹ Bath Gas Light Co. v. Claffy, 15 N. Y. 24; Bloodgood v. Massachusetts Ben. L. Asso., 19 Misc. (N. Y.) 460, 462; s. c. 44 N. Y. Supp. 563.

⁴² Southern P. Co. v. United States, 28 Ct. Cl. 77.

parties to get the benefit of contracts the making of which the sovereign forbids.⁴³

§ 8321. Corporation Estopped to Plead *Ultra Vires* where it has Received the Benefit of the Contract.—Where a contract, not in itself immoral nor against public policy, nor forbidden by the Constitution or by express statute, has been made with a corporation in good faith, and performed by the other party, the corporation will not be permitted, on keeping the fruits of the contract, to escape the performance of the contract on its part, under the plea of *ultra vires*.⁴⁴ Under the operation of this principle, an indebtedness incurred by a private corporation in excess of the authority conferred by its act of incorporation is nevertheless valid and enforceable to the extent of the consideration received therefor.⁴⁵ So, a savings and loan association cannot avoid liability for borrowed money because the loan was *ultra vires*, where it has used the money.⁴⁶ So, a corporation which has engaged in innkeeping, and assumed the liability of an innkeeper towards a guest, receiving a consideration therefor, cannot

⁴³ McNulta v. Corn Belt Bank, 164 Ill. 427, 452; s. c. 45 N. E. Rep. 954; aff'g s. c. 63 Ill. App. 593; Bishop v. American Preservers' Co., 157 Ill. 284.

⁴⁴ Boyd v. American Carbon Black Co., 182 Pa. St. 206; Davies v. Harvey Steel Co., 6 App. Div. 166; s. c. 39 N. Y. Supp. 791; Southern Lumber Co. v. Wireman, 19 Ky. L. Rep. 585; s. c. 41 S. W. Rep. 297 (not to be rep.); Redford Belt Co. v. McDonald, 17 Ind. App. 492; s. c. 46 N. E. Rep. 1022; 60 Am. St. Rep. 172; Kadish v. Garden City &c. Building Assn., 151 Ill. 531; s. c. 42 Am. St. Rep. 503, and note; Williams v. Bank of Commerce, 71 Miss. 858; s. c. 42 Am. St. Rep. 503, and note; Linkauf v. Lombard, 137 N. Y. 417; s. c. 33 Am. St. Rep. 743,—note with cases collated; Carson City Sav. Bank v. Carson City Elevator Co., 90 Mich. 550; s. c. 30 Am. St. Rep. 454, and note; Lyon v. First National Bank, 55 U. S. App. 747; s. c. 85 Fed. Rep. 120; 29 C. C. A. 45; Humphrey v. Patrons' Mercantile Assn., 50 Iowa, 607; Garrett v. Burlington Plow Co., 70 Iowa, 697; s. c.

59 Am. Rep. 461; Warfield v. Marshall County Canning Co., 72 Iowa, 666; Manchester &c. R. Co. v. Concord R. Corp., 66 N. H. 100; s. c. 20 Atl. Rep. 383; Parish v. Wheeler, 22 N. Y. 494; Hays v. Galion Gas Light &c. Co., 29 Ohio St. 330, 340; Bissell v. Michigan &c. R. Cos., 22 N. Y. 258; McCluer v. Manchester &c. R. Co., 13 Gray (Mass.) 124; s. c. 74 Am. Dec. 124; Bradley v. Ballard, 55 Ill. 413; s. c. 7 Am. Rep. 656; Rutland &c. R. Co. v. Proctor, 29 Vt. 93; Dewey v. Toledo &c. R. Co., 91 Mich. 351; s. c. 51 N. W. Rep. 1063; Tootle v. Port Angeles First Nat. Bank, 6 Wash. 181; s. c. 33 Pac. Rep. 345; Schurr v. New York &c. Co., 41 N. Y. St. Rep. 90; s. c. 16 N. Y. Supp. 210; aff'd in 45 N. Y. St. Rep. 645; s. c. 18 N. Y. Supp. 454; Bates v. Coronado Beach Co., 109 Cal. 160; s. c. 41 Pac. Rep. 855.

⁴⁵ Peatman v. Centerville Light &c. Co., 100 Iowa, 245, 250; s. c. 69 N. W. Rep. 541; 6 Am. & Eng. Corp. Cas. (N. S.) 77.

⁴⁶ Grohmann v. Brown, 68 Mo. App. 630.

escape its liability on the plea of *ultra vires*.⁴⁷ One court has held that while no action lies upon an *ultra vires* contract of a corporation, and no decree can be made for its specific performance, nor recovery had at law for its breach,—yet a party to it may recover to the extent of the benefit received by the other party from the former's execution of the agreement.⁴⁸ This relates to the distinction taken by some courts between the right to recover on an *ultra vires* contract, and the right to recover on a *quantum meruit* in respect of the consideration which the other party has received under the contract.⁴⁹

§ 8322. Corporation Estopped to Plead Ultra Vires where the Contract Has Been Executed by the other Party.—If a contract entered into with a corporation is not immoral, nor contrary to public policy, nor forbidden by the Constitution nor by the statute law, and has been executed in good faith by the other party to it, the corporation will be estopped to set up the defense as a reason for not performing it on its part, that it had no power to enter into it.⁵⁰ This is merely another way of stating the doctrine of the preceding section; for in such a case the corporation necessarily has received the benefit or consideration of the contract rendered by the other party to it in pursuance of its terms. For example, a lessee of a corporation cannot escape the payment of rent for the time during which it has undisturbed enjoyment of the property under the lease, merely because the lease was void as against the State because the corporation did not have capacity to make it.⁵¹ For the same reason a street railway company, while in the actual

⁴⁷ Magee v. Pacific Imp. Co., 98 Cal. 678; s. c. 35 Am. St. Rep. 199; 33 Pac. Rep. 772.

⁴⁸ Greenville Compress & W. Co. v. Planters' Compress & W. Co., 70 Miss. 669; s. c. 35 Am. St. Rep. 681; 13 South. Rep. 879.

⁴⁹ Day v. Spiral Springs &c. Co., 57 Mich. 146; s. c. 58 Am. Rep. 352; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290; Davis v. Old Colony R. Co., 131 Mass. 258; s. c. 41 Am. Rep. 221; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441; Ashbury &c. Carriage Co. v. Riche, L. R. 7 H. L. 653; Re Cork &c. R. Co., L. R. 4 Ch. 748.

⁵⁰ McElroy v. Minnesota Percheron

Horse Co., 96 Wis. 317; s. c. 71 N. W. Rep. 652; Redford Belt Co. v. McDonald, 17 Ind. App. 492; s. c. 46 N. E. Rep. 1022; 60 Am. St. Rep. 172; Winscott v. Guarantee Invest. Co., 63 Mo. App. 367; s. c. 2 Mo. App. Rep. 815; Ashenbroedel Club v. Finlay, 53 Mo. App. 256; Montgomery Nat. Bank v. McCleaster, 10 Lanc. L. Rev. 325; s. c. 2 Pa. Dist. Rep. 546; H. Koehler & Co. v. Reinheimer, 26 App. Div. 1; 49 N. Y. Supp. 755; Cunningham v. Massena Springs &c. R. Co., 63 Hun (N. Y.) 439; s. c. 44 N. Y. St. Rep. 723; 18 N. Y. Supp. 600.

⁵¹ Bath Gas Light Co. v. Claffv., 151 N. Y. 24; s. c. 36 L. R. A. 664; 54 Alb. L. J. 389; 45 N. E. Rep. 390.

undisturbed possession of the right to run its cars over the tracks of another company, cannot set up in defense to an action by the latter for the agreed compensation, that such compensation is excessive, and the contract *ultra vires* as being beyond the power of its officers to make.⁵²

§ 8323. Assignee of Corporation Estopped by Receiving Consideration of Ultra Vires Contract.—Although a corporation is not, by its articles, authorized to deal in a particular commodity, yet if it does purchase it and afterwards makes an assignment for its creditors, its assignee cannot resist the payment of the purchase price on the ground that the dealing in the article was *ultra vires* the corporation. The corporation being estopped to set up such a defense while retaining the consideration of the contract, its privy, the assignee, is also estopped.⁵³

§ 8324. Cases where no Estoppel Arises under this Rule.—A contract by a mutual benefit association to pay the death losses of another association, in consideration of the transfer of all the assets of the latter, is *ultra vires* and void, unless expressly authorized, and is not validated as an executed contract by the fact that many new members were acquired under the contract, so as to enable the holder of a death claim against the latter company to recover from the former; since, to occasion any loss to such holder, it must be assumed that the members in the latter company would have continued to pay assessments, and such continuance is highly improbable.⁵⁴ The application of the rule which estops the corporation where the contract is executed on the other side was also denied in a case where the goods were delivered on the unauthorized order of the secretary of the corporation, to *third persons*, and the evidence did not show in what relation those persons stood towards the corporation. The contract was, therefore, not deemed to have been executed as against the corporation, though it had been executed as against the third persons who received the goods.⁵⁵

⁵² Canal &c. R. Co. v. St. Charles Street R. Co., 44 La. An. 1069; s. c. 11 South. Rep. 702.

⁵³ Re Pendleton Hardware Co., 24 Or. 330; s. c. 33 Pac. Rep. 544.

⁵⁴ Twiss v. Guaranty Life Asso., 87 Iowa, 733; s. c. 22 Ins. L. J. 539; 55 N. W. Rep. 8.

⁵⁵ Famous Shoe &c. C. Co. v. Eagle Iron Works, 51 Mo. App. 66.

§ 8325. **Plea of Ultra Vires Available in so far as Contract Remains Executory.**— But while the foregoing proposition is true, the plea of *ultra vires* is available to the corporation while the contract remains wholly executory.⁵⁶ And it has been said that this rule applies where an action is brought to enforce the unexecuted portion of it.⁵⁷ But the proposition cannot be stated in this way without abandoning the principle of estoppel already alluded to; for if one party has wholly executed the contract on his side, and the other party is sued to compel execution on its side, or to recover damages for refusing to execute it, then, upon a principle elsewhere stated,⁵⁸ having received the fruits of the execution of the contract by the other party, it cannot refuse execution on its part or resist the payment of damages for its refusal to execute it. The principle which refuses to compel execution by the other party, or to compel him or it to pay damages for not executing applies only where the contract is immoral, illegal, or contrary to public policy, in which cases the courts leave the parties where they have placed themselves.⁵⁹

§ 8326. **Rule where the Question of Ultra Vires Arises Collaterally.**— Again, cases frequently occur where the question of *ultra vires* arises collaterally, in other words, where the inquiry whether the corporation had the power to do the thing in question does not concern the party making it at all; in which case the rule is that, so long as the government does not cause the charter of the corporation to be revoked, the courts must treat it as competent to contract with third parties.⁶⁰ Under the operation of this rule, in an action by a *lessee* of a railroad *against a third party* for services rendered, the authority to make the lease cannot be called in question on the ground of *ultra vires* or public policy.⁶¹

§ 8327. **Other Instances in which the Plea of Ultra Vires is not Available.**— It has been held that a corporation cannot avoid liability under a contract with another for the purchase of land, and the sharing of the profits and losses thereon, on the ground that it was *ultra vires* because creating a *partnership* with an implied

⁵⁶ Thomas v. Railroad Co., 101 U. S. 71; Kadish v. Garden City &c. Build. Asso., 151 Ill. 531.

⁵⁷ McNulta v. Corn Belt Bank, 164 Ill. 427, 451; s. c. 45 N. E. Rep. 954; aff'g s. c. 63 Ill. App. 593.

⁵⁸ Ante, §§ 8321, 8322.

⁵⁹ Such was the case of McNulta v. Corn Belt Bank, *supra*.

⁶⁰ Southern P. Co. v. United States, 28 Ct. Cl. 77.

⁶¹ Southern P. Co. v. United States, 28 Ct. Cl. 77.

power in the other party to bind it as a partner, where the title was transferred to its appointee, and the entire management of the business contemplated by the contract was intrusted to it.⁶² So, although a corporation called a "lumber, ranch and mining company" was not authorized by its charter to build and operate a railroad, yet it might render itself liable for the price of "railroad supplies" purchased and used by it, especially where the articles were not such that the seller would have notice from their character that the corporation would not have need of them in its business, and where the seller had no notice that they were not to be used for any other purpose than the regular business of the company.⁶³

§ 8328. **Obligations Incurred by Corporations while Engaged in an Ultra Vires Business Enforceable.**—There is judicial authority for the proposition that if a corporation engages in a business, not in itself unlawful or wrongful as against the State or the public, and while engaged in this business incurs an obligation to a third person which would be good against it if it had power to engage in that business, it will not be heard to set up the plea of *ultra vires* when sued to enforce that obligation: as where a manufacturing corporation engages in the business of a common carrier, and while prosecuting such business loses the plaintiff's goods.⁶⁴

§ 8329. **Merger of Ultra Vires Contract in a Judgment.**—In a case in the Supreme Court of Canada, in which different judges rendered separate opinions, it was held, according to the syllabus, that, "if a company enters into a direct transaction which is *ultra vires*, and litigation ensues, in the course of which a *judgment is rendered by consent*, such judgment is as binding upon the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company."⁶⁵

§ 8330. **Right of Stockholders to Have Ultra Vires Transaction Set Aside.**—A stockholder of a corporation owning one-sixth of the stock is not entitled to have a deed from the corporation to a city set aside on the ground that he did not assent to it, and that it was void

⁶² Bates v. Coronado Beach Co., 109 Cal. 160; s. c. 41 Pac. Rep. 855. 417; s. c. 20 L. R. A. 48; 51 N. Y. St. Rep. 63; 33 N. E. Rep. 472.

⁶³ Luttrell v. Martin, 112 N. C. 593; s. c. 17 S. E. Rep. 573. ⁶⁵ Charlebois v. Delap, 26 Can. S. C. 221.

⁶⁴ Linkauf v. Lombard, 137 N. Y.

for want of power in the board of directors to execute it or to authorize its execution, where its execution has been directed at a regular meeting of the stockholders of which he does not deny knowledge, and the city has a right under a statute to acquire the property in question by condemnation if necessary, and the price paid is all that the property is worth.⁶⁶ An exchange by a cemetery company of a portion of its stock, which is almost without any marketable value, for an interest in land which is the only source from which competition could be feared, is not so improvident as to shock the conscience and justify its vacation at the instance of a stockholder, even if the other party to the exchange was not a *bona fide* purchaser.⁶⁷

§ 8331. Right to Rescind Ultra Vires Contract Lost by Laches.—

It seems to be a sound view that if a party has entered into a contract which is immoral, opposed to a sound public policy, or prohibited by the Constitution or by the statute law, so that its continued execution is a continuing public wrong, a court of justice will, *for the sake of the public*, assist one of the parties to extricate himself therefrom.⁶⁸ As relief is given in such a case in right of the public rather than in right of the complaining wrongdoer, it is possible that the *laches* of the latter will not bar his right to relief, on the principle that *laches* are not imputable where public rights are concerned. But where the contract is not of this heinous nature, but is merely beyond the powers of the incorporated party to it in a sense which merely concerns its stockholders and which does not specially concern the State, then the rule is plainly different. Such an agreement will not be rescinded at the instance of a corporation as being *ultra vires* and voidable, after the parties have acquiesced therein for more than fifteen years, and large expenditures have been incurred and improvements made upon the faith thereof, and the corporation has received commensurate benefits and been relieved from burdensome obligations.⁶⁹

⁶⁶ Hall v. Syracuse, 71 Hun (N. Y.) 465; s. c. 54 N. Y. St. Rep. 378; 24 N. Y. Supp. 959.

⁶⁷ Rural Homestead Co. v. Wildes, 54 N. J. Eq. 668; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 26; 35 Atl. Rep. 896.

⁶⁸ Mallory v. Hanauer Oil Works, 86 Tenn. 598.

⁶⁹ Odd Fellows Hall Asso. v. He-

gele, 24 Or. 16; s. c. 32 Pac. Rep. 679. As to the effect of acceptance of the benefit and acquiescence in cutting off the defense of *ultra vires*, see First Presbyterian Church v. National State Bank, 57 N. J. L. 27, 31; Camden & C. R. Co. v. May's Landing & C. R. Co., 48 N. J. L. 530; St. Louis & C. R. Co. v. Terre Haute & C. R. Co., 145 U. S. 393.

CHAPTER CCXII.

POWERS OF CORPORATIONS.

- Art. I. Financial Powers, §§ 8335-8348.
 II. Powers Relating to Shares and Stock, §§ 8351-8356.
 III. Powers Relating to Property, §§ 8358-8370.
 IV. Powers Relating to Business, §§ 8373-8384.
 V. Other Powers, §§ 8387-8393.

ARTICLE I. FINANCIAL POWERS.

SECTION	SECTION
8335. Power to borrow.	8343. Making loans in excess of constitutional, statutory or charter limit.
8336. Power to mortgage property and franchises.	8344. Power to take commercial paper.
8337. Statutory restriction on power to borrow and to mortgage.	8345. Negotiating notes taken in violation of statute.
8338. Prohibitions against the issuing of bonds except for money paid, etc.	8346. Power to guarantee the contracts or obligations of others.
8339. Power to pledge its bonds as collateral security.	8347. Powers to pay brokers' commissions for placing its shares.
8340. Power to emit negotiable paper.	8348. Construction company selling the shares of a gas company may agree to pay interest on anticipated payments.
8341. No power to make or indorse accommodation paper.	
8342. Power to lend, and on what security.	

§ 8335. **Power to Borrow.**— A company established under the English Companies Act of 1862 to purchase and sell estates and property, make advances on property to be sold, make loans upon securities deposited, receive deposits, and discount bills, is a *trading company* which has implied power to borrow money for the repayment of deposits or other business purposes, and to pledge its realty therefor, although its articles contain no such express power.¹

¹ General Auction Estate &c. Co. power to borrow, see 4 **Thomp. Corp., v. Smith**, (1891) 3 Ch. 432. As to the § 5697, *et seq.*

§ 8336. **Power to Mortgage Property and Franchises.**— The power of corporations to mortgage their property and franchises for the purpose of securing their debts is generally regarded as incident to the power to contract debts;² and the power to borrow clearly implies the power to mortgage property to secure the loan.³ This power cannot, however, be exercised without consent of the State by *public* or *quasi-public* corporations;⁴ but corporations having public duties to perform cannot, as elsewhere seen,⁵ enter into engagements which may operate to disable them from performing those duties, without the consent of the State. With this exception the power of a *private* corporation to mortgage its property for the purpose of effecting any of its corporate purposes, is plenary,⁶ although not assumed in its articles of incorporation.⁷ Where it exercises its lawful power to purchase land, it may mortgage the land purchased to secure the purchase money.⁸ The power is often granted by statute in express terms or assumed in the articles of association of the company, in which case it seems that the instrument will be liberally construed so as to effectuate the exercise of the power for appropriate corporate purposes. For example, a corporation authorized by its articles of association to borrow upon mortgage of its freehold, leasehold, hereditaments, works, and other property and effects, may mortgage its *uncalled capital*, although its memorandum of association contains no reference to any borrowing.⁹ Irregularities may exist in the exercise of the power, such as the failure to give the statutory notice of the stockholders' meeting to vote upon the question of making the mortgage, which might possibly avoid it in a direct proceeding brought for that purpose, but which will not subject it to a collateral attack by creditors,

² 5 Thomp. Corp., § 6131.

³ *Bosche v. Toledo Display Horse Co.*, 14 Ohio C. C. 289.

⁴ *Evans v. Boston Heating Co.*, 157 Mass. 37; s. c. 31 N. E. Rep. 698.

⁵ *Post*, § 8392.

⁶ *Evans v. Boston Heating Co.*, 157 Mass. 37; s. c. 31 N. E. Rep. 698; *New Britain Nat. Bank v. A. B. Cleveland Co.*, 91 Hun (N. Y.) 447; s. c. 36 N. Y. Supp. 387; 71 N. Y. St. Rep. 157.

⁷ At least, where the express power is given *by statute*, it is not lost by failing to claim it in the articles: *Sioux City Terminal R. & Co. v.*

Trust Co., 82 Fed. Rep. 124; s. c. 49 U. S. App. 523; 27 C. C. A. 73.

⁸ *Sheppard v. Bonanza Nickle Min. Co.*, (Ch.) 25 Ont. 305. Thus, the board of directors of a street railway company may make a contract for the purchase of a right of way, or for the purchase of any right necessary for the enjoyment and use of its franchise, and may secure the payment of the purchase price by a mortgage upon the plant: *Vanderveer v. Asbury Park & C. Street R. Co.*, 82 Fed. Rep. 355.

⁹ *Jackson v. Rainford Coal Co.*, (1896) 2 Ch. 340; s. c. 65 L. J. Ch. (N. S.) 757.

even though they have a lien, after the corporation and stockholders have become estopped from challenging it by the receipt of the proceeds.¹⁰ Such a mortgage may be a fraudulent conveyance as against the creditors of the corporation; but the question whether it is so or not does not generally involve questions peculiar to corporations.¹¹ The mere disqualification of a director by ceasing to own stock in the corporation, who votes to give a mortgage, does not render it invalid, if he continues to act, since he is a director *de facto*.¹² And although voidable at the suit of persons whose rights it unfavorably affects, because made in violation of the statute law, yet if it is not *malum in se*, the right to avoid it may be lost by *laches*,—as where a judgment creditor sued to avoid a mortgage after having slept on his rights for three years.¹³

§ 8337. **Statutory Restriction on Power to Borrow and to Mortgage.**—A provision of the New York Stock Corporation Law¹⁴ restraining corporations from borrowing money and executing mortgages in excess of their capital stock and also in excess of two-thirds of the value of their corporate property, applies to *railroad corporations*.¹⁵

§ 8338. **Prohibitions Against the Issuing of Bonds Except for Money Paid, Etc.**—A constitutional or statutory provision¹⁶ that “no corporation shall issue stocks or bonds except for money paid,

¹⁰ Campbell v. Argenta Gold & C. Min. Co., 51 Fed. Rep. 1. Manner of stating the object of the meeting in such a notice: Evans v. Boston Heating Co., 157 Mass. 37; s. c. 31 N. E. Rep. 698. That a new vote of the stockholders is not rendered necessary by the fact that, since the mortgage was authorized, the interest of the company has changed from an estate for years into a freehold estate: Evans v. Boston Heating Co., 157 Mass. 37; s. c. 31 N. E. Rep. 698.

¹¹ Not a fraudulent conveyance because made after insolvency to secure advances made during solvency: Brower v. Brooklyn Trust Co., 50 N. Y. St. Rep. 630; s. c. 21 N. Y. Supp. 324. Nor because given when the corporation known to be insolvent, if given in a public business transaction with the hope of saving it: Cochran v. Anglo-American Dry Dock & C. Co.,

69 Hun (N. Y.) 168; s. c. 53 N. Y. St. Rep. 165; 23 N. Y. Supp. 404.

¹² Campbell Printing Press & C. Co. v. Bellman Bros. Co., 11 Ohio C. C. 360.

¹³ New Britain Nat. Bank v. A. B. Cleveland Co., 91 Hun (N. Y.) 447; s. c. 36 N. Y. Supp. 387; 71 N. Y. St. Rep. 157.

¹⁴ Laws New York 1892, ch. 668, § 2.

¹⁵ Flynn v. Coney Island & C. R. Co., 26 App. Div. 416; s. c. 50 N. Y. Supp. 74. A bank which lends a corporation more money than, by its recorded articles, it has power to borrow, can only recover from its assignee for the benefit of creditors as much as it has power to borrow: Covington First Nat. Bank v. D. Kiefer Milling Co., 15 Ky. L. Rep. 457; s. c. 23 S. W. Rep. 675.

¹⁶ Const. Cal., art. 12, § 11; Cal. Civ. Code, § 359.

labor done, or property actually received, and that all fictitious increase of stock or indebtedness shall be void," does not prevent a corporation from *pledging* its bonds as *collateral security* for a debt less in amount than their par value. Such a pledge is, however, "an issue" of the bonds so as to make them valid corporate obligations.¹⁷

§ 8339. Power to Pledge Its Bonds as Collateral Security.—

The power of a corporation to pledge its bonds as collateral security is included in the power to sell them. A constitutional provision that no railroad corporation shall issue stock or bonds except for money, labor, or other property actually received by the corporation, does not prevent such a pledge, where money or other property is actually received by the corporation through such use of them.¹⁸

§ 8540. Power to Emit Negotiable Paper.—In the United States, in the absence of statutory provisions, the power to emit negotiable paper is regarded as one of the incidental or implied powers of every private corporation.¹⁹ The power necessarily follows from the power to borrow money,²⁰ or to become indebted in any lawful way.²¹ This is nothing more than giving that form of security for a debt which is exacted by ordinary business usage. Nor is this power affected by constitutional provisions or statutes imposing restraints upon the issuing of *stocks* or *bonds*.²²

§ 8341. No Power to Make or Indorse Accommodation Paper.—

A corporation has no power to make or indorse commercial paper

¹⁷ Atlantic Trust Co. v. Woodbridge Canal &c. Co., 79 Fed. Rep. 842.

¹⁸ Illinois Trust &c. Bank v. Pacific R. Co., 117 Cal. 332; s. c. 49 Pac. Rep. 197.

¹⁹ Marshall Nat. Bank. v. O'Neal, 11 Tex. Civ. App. 640; s. c. 34 S. W. Rep. 344.

²⁰ People v. American Steam Boiler Ins. Co., 3 App. Div. (N. Y.) 504; s. c. 73 N. Y. St. Rep. 826; 38 N. Y. Supp. 406; aff'g s. c. 14 Misc. 162; s. c. 70 N. Y. St. Rep. 3; 35 N. Y. Supp. 355.

²¹ Kneeland v. Braintree Street R. Co., 167 Mass. 161; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 473; 45 N. E.

Rep. 86. As to the power of a corporation to give notes, see National Bank of the Republic v. Young, 41 N. J. Eq. 531; Sheridan Electric Light Co. v. Chatham Nat. Bank, 52 Hun (N. Y.) 575; Tod v. Kentucky Union Land Co., 57 Fed. Rep. 47; Hayward v. Graham Book &c. Co., 59 Mo. App. 453; Temple Street Cable R. Co. v. Hellman, 103 Cal. 634.

²² Marshall Nat. Bank. v. O'Neal, 11 Tex. Civ. App. 640; s. c. 34 S. W. Rep. 344; Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505; s. c. 9 Bkg. L. J. 450; 34 N. E. Rep. 1083.

for the accommodation of others, unless the power is expressly conferred by its charter or governing statute;²³ but where the corporate officer or agent making or indorsing such paper, has apparent authority so to do, it will be good as against the corporation in the hands of a *bona fide* purchaser for value before maturity without notice that it is accommodation paper;²⁴ and circumstances may exist where such paper may be enforced against the corporation although in the hands of persons chargeable with notice of the circumstances under which it is executed. Thus, a trading corporation is liable under its indorsement of a note of another company, made *in part* to enable the maker to raise money to pay obligations due to the company, where such obligations are paid with the money.²⁵

§ 8342. **Power to Lend, and on What Security.**—The right to lend money is within the general power of an *investment company*.²⁶

§ 8343. **Making Loans in Excess of Constitutional, Statutory or Charter Limit.**—A loan made by a bank in excess of the statutory limit, is enforceable to the extent of that limit.²⁷ It has been held that a *trust deed* executed by a corporation is *not fraudulent* because some of the notes secured thereby were executed individually

²³ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582; *Benedict v. Market Nat. Bank*, 4 Ohio N. P. 231; s. c. 6 Ohio Dec. 320; *Lyon P. & Co. v. First Nat. Bank*, 85 Fed. Rep. 120; s. c. 55 U. S. App. 747; 29 C. C. A. 45.

²⁴ *Marshall Nat. Bank. v. O'Neal*, 11 Tex. Civ. App. 640; s. c. 34 S. W. Rep. 344; *American Trust & C. Bank v. Gluck*, 68 Minn. 129; s. c. 70 N. W. Rep. 1085; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582; *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505; s. c. 9 Bkg. L. J. 450; 34 N. E. Rep. 1083.

²⁵ *Lyon P. & Co. v. First Nat. Bank*, 85 Fed. Rep. 120; s. c. 55 U. S. App. 747; 29 C. C. A. 45. A bill of exchange executed by a corporation in favor of a firm which, for all practical purposes, is the same person as

the corporation, is obligatory upon the latter, although it may not have authority to execute paper for the accommodation of other parties: *National Bank v. John G. Mattingly & Sons*, 18 Ky. L. Rep. 425; s. c. 33 S. W. Rep. 415; rehearing denied in 36 S. W. Rep. 953.

²⁶ *Brown v. Elwell*, 17 Wash. 442; s. c. 49 Pac. Rep. 1068. Construction of Maryland statute of 1894, ch. 629, prohibiting corporations from lending money on security of chattels or otherwise except in their own proper names, etc., with the conclusion that it does not apply to a loan by a foreign corporation upon leasehold property: *Commercial Building & C. Asso. v. Mackenzie*, 85 Md. 132; s. c. 36 Atl. Rep. 754 (interesting opinion on statutory interpretation).

²⁷ *McClintock v. Central Bank*, 120 Mo. 127; s. c. 24 S. W. Rep. 1052.

by directors of the corporation who participated in the authorization of such deed, where such notes were given for a corporate indebtedness to evade a provision in the charter of the bank which loaned the money, prohibiting it from making a loan to any one corporation beyond a specified amount.²⁸

§ 8344. **Power to Take Commercial Paper.**—A maker of a promissory note given to a mutual benefit society for money lent, cannot defend an action thereon on the ground that the corporation had no power to take such an obligation for money lent.²⁹

§ 8345. **Negotiating Notes Taken in Violation of Statute.**—A corporation is liable upon a note payable to it to one who discounted it for the benefit of the corporation, although it was given by the treasurer in payment of his subscription for stock in violation of a statute providing that no corporation shall issue stock except for money, labor done, or property actually received.³⁰

§ 8346. **Power to Guarantee the Contracts or Obligations of Others.**—The power to guarantee the obligations of others for their mere *accommodation* rests on the same footing as the power to make or indorse commercial paper for accommodation,³¹ and, in the absence of express statutory authorization, or of a grant of the power by the State by clear implication, does not exist;³² and if the power is given by express statute, but to be exercised in a prescribed mode, or under prescribed conditions, this precludes the exercise of it in any other mode, or under any other conditions.³³ But many circumstances exist in which corporations may rightfully exercise this power in furtherance of their own corporate purposes,—in which

²⁸ Allen v. Dayton Hotel Co., 95 Tenn. 480; s. c. 32 S. W. Rep. 962. ²⁹ Kripner v. Lincoln, 66 Ill. App. 532; s. c. 1 Chic. L. J. Wkly. 644.

³⁰ N. Y. Laws 1892, ch. 688, § 42; First. Nat. Bank v. Cornell, 8 App. Div. (N. Y.) 427; s. c. 40 N. Y. Supp. 850; 29 Chic. Leg. News, 34.

³¹ *Ante*, § 8341.

³² Louisville &c. R. Co. v. Ohio Valley Imp. &c. Co., 69 Fed. Rep. 431. As to the power of one corporation to guarantee or assume the debts of another,—see Holmes v. Willard, 125 N. Y. 75, 81; s. c. 11 L. R. A. 170;

Connecticut Mut. &c. Ins. Co. v. Cleveland &c. R. Co., 41 Barb. (N. Y.) 9; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381; s. c. 16 L. ed. 488; Marbury v. Kentucky Union Land Co., 62 Fed. Rep. 335; s. c. 22 U. S. App. 267; 10 C. C. A. 393; Louisville &c. R. Co. v. Ohio Valley Imp. &c. Co., 69 Fed. Rep. 431; Humboldt Min. Co. v. Variety Iron Works Co., 22 U. S. App. 334; Ellerman v. Chicago Junction R. &c. Co., 49 N. J. Eq. 217.

³³ Louisville &c. R. Co. v. Ohio Valley Imp. &c. Co., *supra*.

cases it is either regarded as an inherent power, or as a power implied from the express grant of other powers. Thus, the power to issue negotiable paper is held to carry with it the power to guarantee payment of such paper when transferring it in the due course of its business.³⁴ A corporation having power to take and dispose of the securities of another corporation may guarantee their payment, if it disposes of them to another party in payment of its own debt; and if it buys property subject to a mortgage securing bonds, it may guarantee the payment thereof, if such guarantee is taken as payment *pro tanto* of its debt.³⁵ A land company, authorized by statute to own stock of a railroad company, may guarantee a dividend upon the preferred stock of such company.³⁶ One company owning shares of stock of another company may guarantee the bonds of the latter.³⁷ A company organized to improve town sites may, in order to induce the removal of a store to its town, guarantee that a railroad will reach the town site within a given time.³⁸ A street railroad company may, in order to procure a right of way over streets owned by a land company, guarantee that certain lots of the land company will become worth a certain price when the road is built, and agree to pay the difference between such price and what the lots will bring at auction.³⁹ A lumber company may, with the assent of its directors and stockholders, in order to get a railroad completed to the country from which its lumber is drawn, guarantee the interest upon the bonds of a company organized to complete such road, especially where most of the shares of stock of both companies are owned by the same persons.⁴⁰ A lumber company may become a surety on the bond of a building

³⁴ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582.

³⁵ *Ellerman v. Chicago Junction R. & Co.*, 49 N. J. Eq. 217; s. c. 11 Rail. & Corp. L. J. 97; 35 Am. & Eng. Corp. Cas. 388; 23 Atl. Rep. 287. That the provision of Pa. Act June 26, 1895, relating to the acceptance of trust and surety companies as sureties or guarantors upon bonds or other obligations, applies only to *foreign corporations*,—see *Re Surety Bonds*, (Atty.-Gen.) 4 Pa. Dist. Rep. 669; s. c. 17 Pa. Co. Ct. 101.

³⁶ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582.

³⁷ *Tod v. Kentucky Land Co.*, *supra*; *Dougan v. Evansville & C. R. Co.*, 15 App. Div. (N. Y.) 483; s. c. 44 N. Y. Supp. 503.

³⁸ *Arkansas Valley & C. Co. v. Lincoln*, 56 Kan. 145; s. c. 42 Pac. Rep. 706.

³⁹ *Vanderveer v. Asbury Park & C. R. Co.*, 82 Fed. Rep. 355.

⁴⁰ *Mercantile Trust Co. v. Kiser*, 91 Ga. 636; s. c. 18 S. E. Rep. 358. Power of a railroad company to guarantee the bonds of another such company to extend its connections, under a statutory authorization: *Louisville Trust Co. v. Louisville & C. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

contractor, in order to secure a sale of its lumber.⁴¹ A brewing company may, under a well-known practice of brewers, in order to create or maintain a market for its beer, install a saloon-keeper or hotel-keeper in certain premises, and guarantee the performance of the covenants of the lease taken by him; and in general it may be said that guaranties by brewing companies of the covenants in the leases of their customers are not regarded as *ultra vires*,⁴² especially where, as is often the case, the fixtures are mortgaged to the company.⁴³

§ 8347. Power to Pay Brokers' Commissions for Placing Its Shares.— An English limited company has power to pay a reasonable sum to brokers for *commissions* for placing its shares.⁴⁴

§ 8348. Construction Company Selling the Shares of a Gas Company May Agree to Pay Interest on Anticipated Payments.— A construction company agreed to construct the works of a gas company and to receive in part payment therefor its stock and bonds. In order to raise money to carry on the work, it undertook to procure subscribers to the stock of the gas company, and it agreed with

⁴¹ Wheeler, O. & Co. v. Everett Land Co., 14 Wash. 630; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 185; 45 Pac. Rep. 316.

⁴² Winterfield v. Cream City Brew. Co., 96 Wis. 239; s. c. 71 N. W. Rep. 101; 7 Am. & Eng. Corp. Cas. (N. S.) 353; Holm v. Claus Lipsius Brew. Co., 21 App. Div. (N. Y.) 204; s. c. 47 N. Y. Supp. 518. But see Fuld v. Burr Brew. Co., 45 N. Y. St. Rep. 649; s. c. 18 N. Y. Supp. 456; Filon v. Miller Brew. Co., 38 N. Y. St. Rep. 602; s. c. 15 N. Y. Supp. 57.

⁴³ Standard Brewery v. Kelly, 66 Ill. App. 267; s. c. 1 Chic. L. J. Wkly. 288. A guaranty by a brewing corporation of the performance by the lessee of the covenants in a lease of a saloon was held not *ultra vires*, where the lessee had not been a customer of the corporation, but had *promised to become such*, and the guaranty was executed for the purpose of securing his trade: Koehler v. Reinheimer, 26 App. Div. (N. Y.) 1; rev'g s. c. 20 Misc. (N. Y.) 62; 45 N. Y. Supp. 337. A power given a railroad company to guarantee the bonds of an-

other company upon such conditions and terms as may be agreed upon impliedly includes the power to receive as consideration for such guaranty *stock* of the company whose bonds are guaranteed: Louisville Trust Co. v. Louisville & C. R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550. A restriction upon the power of a corporation to guarantee the bonds of another company, imposed by statute of the State in which it is originally organized, will not apply to a corporation created by a statute of *another State* incorporating such company in the latter,—especially where such restriction is not enacted until after power is given by the latter State to make the guaranty: Louisville Trust Co. v. Louisville & C. R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

⁴⁴ Metropolitan Coal Consumers' Asso. v. Scrimgeour, (C. A.) [1895] 2 Q. B. 604; s. c. 65 L. J. Q. B. (N. S.) 22; 73 Law T. Rep. 137; distinguishing Re Faure Electric Accumulator Co., 40 Ch. Div. 191.

such subscribers that interest would be paid on any payments which they might make in anticipation of the dates at which payments were due by the contract of subscription. It was held that this was an agreement which it might lawfully make. It had a right to sell its own property for the best price it could get; it was a mere matter of bargain and sale. The doctrine of *ultra vires* had no application. It was bound by its contract as made.⁴⁵

ARTICLE II. POWERS RELATING TO SHARES AND STOCK.

SECTION	SECTION
8351. Cannot purchase its own shares.	8355. Status of corporations as members of building associations.
8352. When can purchase its own shares.	8356. Transfer of all its property to another company in exchange for shares of the latter.
8353. Cannot be a stockholder in another corporation.	
8354. Circumstances under which one corporation can be a stockholder in another.	

§ 8351. **Cannot Purchase Its Own Shares.**— A corporation has no inherent power to create a debt by borrowing money with which to purchase its own stock,— especially when it is in failing circumstances; and a person who, under such circumstances, lends it money wherewith to purchase its own shares, knowing that such is its condition, does so at his peril.⁴⁶ It may within a reasonable time repudiate a purchase of its own stock, where its enforcement would be disastrous to the main body of the stockholders, although the original intention, which has failed of accomplishment, was to benefit all the stockholders.⁴⁷

§ 8352. **When can Purchase Its Own Shares.**— The general rule is that a corporation cannot buy or sell its own shares unless the power to do so is conferred by its charter or governing statute; but, in the absence of a statutory provision, it may buy in its shares for the purpose of saving a debt, or under other circumstances, where it is clearly beneficial to the corporation so to do.⁴⁸ In Illinois it

⁴⁵ Hetfield v. Addicks, 154 Pa. St. 1; s. c. 32 W. N. C. 162; 26 Atl. Rep. 215.

⁴⁶ Adams &c. Co. v. Deyette, 8 S. D. 119; s. c. 65 N. W. Rep. 471; 31 L. R. A. 497. As to the power of a corporation to purchase and own its own shares, see note, 18 L. R. A. 254.

⁴⁷ Price v. Pine Mountain Iron &c. Co., 17 Ky. L. Rep. 865; s. c. 32 S. W. Rep. 267.

⁴⁸ St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142.

seems that a corporation may become the purchaser of its own shares; and hence it may issue bonds to holders of its capital stock in consideration of an assignment to it of such stock.⁴⁹

§ 8353. **Cannot be a Stockholder in Another Corporation.**— The general rule is that one corporation cannot, for the purpose of controlling or managing the business of another corporation, or of participating in the control or management thereof, become a stockholder in such other corporation, without the consent of the State expressed in its Constitution or in its legislation.⁵⁰ The view has been recently taken that an attempted subscription or contract of subscription by one corporation for shares in another, without statutory authority, is not voidable merely, but utterly void.⁵¹ A purchase of shares of a domestic corporation by a *foreign corporation* engaged in a similar business, for the express purpose of controlling and managing the domestic corporation, is *ultra vires* and void.⁵² So, a solvent corporation conducting a prosperous business cannot, in the absence of any exigency, sell its whole assets, taking in part payment the stock of a new corporation organized to carry on the

⁴⁹ *Havemayer v. Bordeaux Co.*, (Ill. C. C.) 8 Nat. Corp. Rep. 127. Under English company law, an arrangement by which a corporation having two hotels, one of which is held under an onerous lease, sells the lease, good-will, furniture, and stores of such leasehold hotel, upon the payment of a certain sum to the company, to some of its stockholders, who assume the obligations of the company under the lease and indemnify it against loss, and, as a part of the arrangement, surrender their shares, the stock of the company being correspondingly reduced,—is *not a purchase* by the company of its own shares within a prohibition in its articles of association of such purchase, the articles authorizing *reduction* of capital and *surrender* of paid-up shares; but is a *sale of assets* for less than their value, in consideration of a release from burdens, and a surrender of shares for which no salable assets are parted with; and may hence be made without the sanction of the court except for the treatment of the shares surrendered as extinguished; and such a reduction of capital should be

sanctioned: *Re Denver Hotel Co.*, (C. A.) (1893) 1 Ch. 495; s. c. 40 Am. & Eng. Corp. Cas. 323.

⁵⁰ 1 Thomp. Corp., § 1102; *California Bank v. Kennedy*, 167 U. S. 362; s. c. 17 Sup. Ct. Rep. 831; 14 Bkg. L. J. 375; *Marble Co. v. Harvey*, 92 Tenn. 115; s. c. 18 L. R. A. 252; 36 Cent. L. J. 9; 20 S. W. Rep. 427; *Louisville & C. R. Co. v. Howard*, 15 Ky. L. Rep. 25; *Whitwam v. Watkin*, 78 Law T. Rep. 188; *Pauly v. Coronado Beach Co.*, 56 Fed. Rep. 428; *Commercial Fire Ins. Co. v. Montgomery County*, 99 Ala. 1; s. c. 14 South. Rep. 490; *Knowles v. Sandercock*, 107 Cal. 629; *Easun v. Buckeye Brew. Co.*, 51 Fed. Rep. 156; s. c. 41 Am. & Eng. Corp. Cas. 19; *Denny Hotel Co. v. Schram*, 6 Wash. 134; s. c. 32 Pac. Rep. 1002.

⁵¹ *Lanier Lumber Co. v. Rees*, 103 Ala. 622; s. c. 16 South. Rep. 637. Compare *Farmers' Loan & C. Co. v. New York & C. R. Co.*, 150 N. Y. 410; s. c. 34 L. R. A. 76.

⁵² *Marble Co. v. Harvey*, 92 Tenn. 115; s. c. 18 L. R. A. 252; 36 Cent. L. J. 9; 20 S. W. Rep. 427.

business.⁵³ An incorporated insurance company cannot invest its capital in the capital stock of a proposed corporation, under a statute⁵⁴ authorizing such companies to invest their money in "stock or choses in action, and to sell the same."⁵⁵ A corporation organized to acquire and improve lands, and to acquire and exercise street railroad, telegraph, lighting and similar franchises over the property, and to maintain every right, privilege and interest in and over the property that a private owner could, has no power to subscribe for shares in another corporation organized to *manufacture woodwork*.⁵⁶ A *purchase* by one railroad company, of stock in another, is not within charter authority to *subscribe* to stock in the other company and hold shares therein.⁵⁷ Shares of a *savings bank*, not taken as security, or acquired in the course of the business of banking, cannot be held by a *national bank*.⁵⁸ In California, corporations are forbidden to engage in any business not authorized by their charters or by the laws under which they are organized. It follows that a corporation organized for the purpose of *manufacturing*, buying or selling furniture and upholstery, cannot hold stock in a *hotel corporation*, and that its subscription to such stock is *ultra vires* and void, and cannot be enforced while it remains executory. The subscribing corporation cannot, therefore, be charged with liability to the creditors of the hotel corporation.⁵⁹ A corporation whose charter contains no provision allowing it to *subscribe* for shares in another company is not liable for an assessment upon shares subscribed for by it, although the assessment is made upon all stockholders as a class, for the reason that it is not a stockholder.⁶⁰

§ 8354. **Circumstances under Which One Corporation Can Be a Stockholder in Another.**—On the other hand, one corporation can be a stockholder in another where the legislature permits it; since what the legislature sanctions cannot be declared to be against

⁵³ Eason v. Buckeye Brew. Co., 51 Fed. Rep. 156; s. c. 41 Am. & Eng. Corp. Cas. 19.

⁵⁴ Ala. Code, 1886, par. 1535, subd. 7.

⁵⁵ Commercial Fire Ins. Co. v. Montgomery County, 99 Ala. 1; s. c. 14 South. Rep. 490.

⁵⁶ Pauly v. Coronado Beach Co., 56 Fed. Rep. 428.

⁵⁷ Whitwam v. Watkin, (Ch.) 78 Law T. Rep. 188.

⁵⁸ California Nat. Bank v. Kennedy, 107 U. S. 362; s. c. 14 Bkg. L. J. 375; 17 Sup. Ct. Rep. 831.

⁵⁹ Knowles v. Sandercock, 107 Cal. 629.

⁶⁰ Peshtigo Co. v. Great Western Tel. Co., 50 Ill. App. 624.

public policy.⁶¹ Accordingly, it has been held that a corporation which is empowered by the law of its creation to *loan money on chattel or personal security*, to buy, sell, hold and transfer notes and other securities and evidences of indebtedness, to make contracts, to acquire and transfer property, and to exercise the same powers in other respects which private persons enjoy,—has power to accept the shares of another corporation as *collateral security* for its note.⁶² In Ohio, according to a decision of the Circuit Court, three judges concurring, a corporation cannot subscribe to the capital stock of another corporation and thus aid in the *formation* of a *new corporation*; but if not prohibited by its charter, it may invest in, hold, or own stock in any corporation, and will be liable for assessments thereon the same as an individual would be;⁶³ and this seems to be a sensible distinction. A corporation known as a *land company*, empowered by the law of its creation to purchase and lease land, purchase ore, timber and machinery, open and develop mines, acquire necessary rights of way, export the products of the mines, establish necessary factories, and prepare timber for market, with all rights, powers, privileges and franchises necessary to the full use and enjoyment of such powers, and further authorized to make a temporary *consolidation* with a railroad company,—has power to acquire a controlling interest in the stock of a railroad company running to its lands, and the right to exercise control over such company through the ownership of such shares.⁶⁴ A corporation whose articles of incorporation, the same being within the scope of an enabling act, authorizes it to buy, sell, and deal in all kinds of public and private stocks, may hold stock of another corporation, and may vote in respect of it.⁶⁵ Moreover, if a corpo-

⁶¹ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582.

⁶² *Calumet Paper Co. v. Stotts Invest. Co.*, 96 Iowa, 147; s. c. 64 N. W. Rep. 782.

⁶³ *Smith v. Newark &c. R. Co.*, 8 Ohio C. C. 583.

⁶⁴ *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; s. c. 44 Am. & Eng. Corp. Cas. 582; s. c. aff'd on this point, *sub nom. Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335; s. c. *sub nom. Marbury v. Tod*, 22 U. S. App. 267.

⁶⁵ *Market Street R. Co. v. Hellman*, 109 Cal. 571; s. c. 42 Pac. Rep. 225.

The ownership by a railroad company of a controlling interest in the capital stock of a corporation engaged in mining bituminous coal and manufacturing coke does not violate Pa. Const. art. 17, § 5, prohibiting any common carrier from engaging in mining or manufacturing articles for transportation over its works: *Hartwell v. Buffalo &c. R. Co.* (Pa. Dep. Internal Affairs) 6 Pa. Dist. Rep. 212; s. c. 19 Pa. Co. Ct. 231. See also *Accident Co. Investments*, 16 Pa. Co. Ct. 312. A provision of the statute under which a corporation is organized, that it shall not be lawful to use its funds in purchasing stock in any

ration has power, under its governing statute, to acquire shares in another corporation for any purpose, but acquires them under circumstances which make the acquisition of them *ultra vires*, and holds them and reaps the profits upon them,— it cannot, when the corporation whose shares they are becomes insolvent, resist an assessment for the benefit of its creditors, on the ground that it had no power to acquire them.⁶⁶ A power in a corporation to acquire stock in another corporation may be implied from a charter power to *consolidate* with such company, as a proper step towards consolidation or as necessarily included in the grant of so large a power.⁶⁷

§ 8355. **Status of Corporations as Members of Building Associations.**— Although a corporation may have no power to become a member of a building association, yet it may well be held liable in equity for money borrowed from such association, which it has agreed to pay back, and which it has agreed shall be a lien upon its property.⁶⁸

§ 8356. **Cannot Transfer All of Its Property to Another Company in Exchange for Shares of the Latter.**— A transfer by a corporation of its entire assets and property of every description to another corporation, in exchange for the shares of the latter, made not with the intention of winding up its affairs and dividing its stock among its own stockholders, nor as a temporary arrangement, but as a permanent investment, is *ultra vires*, and may be set aside at the suit of a dissenting stockholder. Nor is the right of the stockholder to contest it at all affected by the fact that it may be profitable to the corporation: it is enough that it is *ultra vires*.⁶⁹ A sale of the entire manufacturing plant of a corporation, including its patents, processes, and good-will, with an agreement that it would never again engage in the same business, made in considera-

other corporation, does not prevent the corporation from *being a member of a building association*, for the purpose of borrowing money to carry out its legitimate business: *Norfolk Sav. Bank Co. v. Norwalk Metal Spinning &c. Co.*, 14 Ohio C. O. 1; rev'g s. c. 6 Ohio Dec. 70.

⁶⁶ *Citizens' State Bank v. Hawkins*, 71 Fed. Rep. 369; s. c. 34 U. S. App. 423; 18 C. C. A. 78.

⁶⁷ *Louisville Trust Co. v. Louisville &c. R. Co.*, 75 Fed. Rep. 433; s. c. 43 U. S. App. 550.

⁶⁸ *Norwalk Sav. Bank Co. v. Norwalk Metal Spinning &c. Co.*, 14 Ohio C. O. 1; rev'g s. c. 6 Ohio Dec. 70.

⁶⁹ *Byrne v. Schuyler Electric Man. Co.*, 65 Conn. 336; s. c. 28 L. R. A. 304 (reviewing authorities).

tion of stock in a new corporation, without intending to wind up the affairs of the former, but with the object of continuing its corporate life and activity, to be exercised through the other corporation,—is *ultra vires* and void, without reference to its illegality as tending to monopoly, or as being in violation of the statute law of the State of the corporation, on the ground of the inability of corporations to invest their moneys in the shares of other corporations without legislative sanction.⁷⁰ A solvent going business corporation whose charter authorizes it to “take stock” in other corporations cannot, without the consent of all its stockholders, make a valid sale of its entire property to another corporation, whose charter grants it more extensive powers and authorizes it to make the purchase in question, provided that nothing in the charter shall be construed to impair or affect the rights of any stockholder of the former corporation, where the only consideration is the issue of stock and bonds of the new corporation to the old corporation to be distributed among its stockholders, and no provision is made for cash payments to non-consenting stockholders; and such a transfer may be enjoined at the suit of a dissenting stockholder of the selling corporation.⁷¹

ARTICLE III. POWERS RELATING TO OTHER PROPERTY.

SECTION	SECTION
8358 Power to take and hold land not questioned collaterally, but by the State alone.	8365. Power to lease its land.
8359. Construction of statutes conferring this power.	8366. Power to enter into covenant to insure leased property.
8360. Conveyances to corporations pass the fee—not merely a determinable fee.	8367. Power to spend money in improving its real property.
8361. Can assume incumbrances upon land purchased.	8368. Power to improve the property of others to enhance its own.
8362. Power to purchase what property other than land.	8369. Power to expend money for collateral objects to improve its property or business.
8363. Power to sell its land.	8370. Land companies may make what contracts, and what not.
8364. Power to sell its other property.	

⁷⁰ *McCutcheon v. Merz Capsule Co.*, 71 Fed. Rep. 787; s. c. 31 L. R. A. 415; 37 U. S. App. 586; 3 Am. & Eng. Corp. Cas. (N. S.) 446. *Contra*, under the Canada Joint Stock Companies

Act; *McCausland v. Hill*, 23 Ont. App. 738.

⁷¹ *Elyton Land Co. v. Dowdell*, 113 Ala. 177; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 85; 20 South. Rep. 981.

§ 8358. **Power to Take and Hold Land not Questioned Collaterally, but by the State Alone.**—The title to real property of a corporation which has power to take and hold real estate *for any purpose* cannot be questioned in a collateral action by a private person upon the ground that it was not purchased for any of the purposes for which the corporation is authorized to hold real estate, but that question can only be raised by the State.⁷² The question of the legal capacity of a corporation to take a devise of property *in excess of the amount prescribed by its charter* or governing statute cannot be raised collaterally by private persons, such as the testator's heirs or next of kin, or in any other way except in a direct proceeding by the State.⁷³ The question whether land owned by a foreign religious corporation is *more than* "may be necessary" within the meaning of a statute, for a church building designed to be erected thereon, can be raised only by the State.⁷⁴ In a very elaborate judicial discussion of this question by Mr. Chief Justice Peters, writing the opinion of the Supreme Judicial Court of Maine, in which the conclusions of the present author⁷⁵ are quoted at length and with approval, and in which the doctrine of the Court of Appeals of New York⁷⁶ is challenged,—the conclusion of the court was that a bequest to an incorporated charitable institution of property in excess of amount which such corporations are allowed by general statute to take and hold, if it is *not prohibited* by the Statute of Wills, or by the charter of the incorporation, or by the law which authorized its organization, and there is no penalty for taking in excess of the limitation,—is not void, but merely voidable, and can be avoided by the State alone.⁷⁷ On like grounds, the objection that an executed purchase of land by a *national bank* was *ultra vires* can be raised by the United States alone.⁷⁸

⁷² Cooney v. A. Booth Packing Co., 169 Ill. 370; s. c. 48 N. E. Rep. 406.

⁷³ Hanson v. Little Sisters of the Poor, 79 Md. 434; s. c. 32 L. R. A. 293; 32 Atl. Rep. 1052; Re Stickney's Will, 85 Md. 79; s. c. 35 L. R. A. 693; 36 Atl. Rep. 654; Lauder v. Peoria Agricultural & C. Soc., 71 Ill. App. 475; Farrington v. Putnam, 90 Me. 405; s. c. 37 Atl. Rep. 652; 38 L. R. A. 339. See an elaborate note on this question, 32 L. R. A. 293, *et seq.*

⁷⁴ Reorganized Church of Jesus Christ v. Church of Christ, 60 Fed. Rep. 937.

⁷⁵ 5 Thomp. Corp., §§ 5787, 5800, 6033.

⁷⁶ Re McGraw's Estate, 111 N. Y. 66; s. c. 2 L. R. A. 387.

⁷⁷ Farrington v. Putnam, 90 Me. 405; s. c. 37 Atl. Rep. 652; 38 L. R. A. 339.

⁷⁸ Hennessy v. St. Paul, 54 Minn. 219; s. c. 55 N. W. Rep. 1123; Fortier v. New Orleans Nat. Bank, 112 U. S. 439, 451; National Bank v. Matthews, 98 U. S. 621; National Bank v. Whitney, 103 U. S. 99; Merchants' Nat. Bank v. Hanson, 33 Minn. 40; s. c. 21 N. W. Rep. 849.

§ 8359. **Construction of Statutes Conferring This Power.**— A statute empowering corporations of a certain character to *hold real estate* applies to corporations of the kind which were *previously organized*.⁷⁹ The power to take and hold land carries with it, by reasonable implication, the power to contract for the *repairing of buildings* erected thereon.⁸⁰

§ 8360. **Conveyances to Corporations Pass the Fee — not Merely a Determinable Fee.**— A conveyance in fee to a corporation having a limited existence is not limited to its life, and does not give the grantor a resulting trust which will take effect when the corporation ceases to exist.⁸¹

§ 8361. **Can Assume Incumbrances upon Land Purchased.**— A corporation having a general power to purchase real estate has power to purchase incumbered real estate, and this necessarily includes the power to assume the incumbrances.⁸²

§ 8362. **Power to Purchase what Property Other than Land.**— A corporation organized to manufacture and supply illuminating and heating gas may purchase the right, under a patent issued by the United States, to use and deal in steam heaters, radiating mantels, and gas-consuming appliances, where such purchase is advantageous to its business as a manufacturer and distributor of gas.⁸³ A corporation created to do a hardware business may purchase *outstanding claims* against its debtor for the protection of its own claim, and such a purchase, for such a purpose, made in good

⁷⁹ Ashenbroedel Club v. Finlay, 53 Mo. App. 256.

⁸⁰ Ashenbroedel Club v. Finlay, 53 Mo. App. 256. The acquiring and working a mine in the colony of Victoria is not a carrying out of the objects of a corporation whose paramount object was to work gold mines in West Australia, with a particular mine in view, although the *memorandum of association* specified as an object the working of mines in West Australia or elsewhere; so that, where the particular mine contemplated by the promoters was worthless, an order for winding up the company was made: *Re Coolgardie Consol. Gold Mines*, (C. A.) 76 Law T. Rep. 269.

⁸¹ Wilson v. Leary, 120 N. C. 90; s. c. 38 L. R. A. 240; 6 Am. & Eng. Corp. Cas. (N. S.) 400; 26 S. E. Rep. 630; overruling Fox v. Horah, 1 Ired. Eq. (N. C.) 358; citing 5 Thomp. Corp., § 6720.

⁸² Woods Invest. Co. v. Palmer, 8 Colo. App. 132; s. c. 45 Pac. Rep. 237.

⁸³ Malone v. Lancaster Gas Light & Co., 182 Pa. St. 309; s. c. 40 W. N. C. (Pa.) 434; 15 Nat. Corp. Rep. 98; 14 Lanc. L. Rev. 321; 37 Atl. Rep. 932; citing Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315; aff'g s. c. 14 Lanc. L. Rev. 225.

faith, is not *ultra vires*.⁸⁴ But a corporation does not possess power to acquire by assignment a *claim for damages* growing out of an alleged conspiracy to defraud, which is in no way connected with its own affairs.⁸⁵ If, however, it does purchase, pay for and take an assignment of a cause of action, respecting matters outside the purposes of its creation and not authorized by its charter, and brings an action to enforce the cause of action which is so acquired, its want of power to engage in such business cannot be set up as a defense,—the reason being that, if it has offended at all, its offense is against the sovereignty of the State, and not against the individual defendant.⁸⁶

§ 8363. **Power to Sell Its Land.**—The *jus disponendi* being a necessary incident to the ownership of property, every corporation may be assumed to have the power to sell any property which it may chance to own; and we may be careless and indifferent to the circumstances under which this power has been upheld.⁸⁷ It may be stated generally that every corporation — even those organized for ideal purposes — which has power to own land, has an implied power to *sell* it,⁸⁸ and this includes the power to *mortgage* it.⁸⁹ This is quite a different thing from the general power of a corporation to engage in the business of dealing in land by *buying* as well as *selling*.⁹⁰ Nor is this inconsistent with a holding to the effect that a corporation cannot sell all of its property to a non-resident corporation, for the purpose of terminating its existence and transferring its business to the latter, without the unanimous consent of its stockholders.⁹¹ And, quite clearly, the *trustees* or *directors* of

⁸⁴ Mahoney v. Butte Hardware Co., 19 Mont. 377; s. c. 48 Pac. Rep. 545.

⁸⁵ John V. Farwell Co. v. Wolf, 96 Wis. 10; s. c. 37 L. R. A. 138; 70 N. W. Rep. 289; rehearing denied in 37 L. R. A. 142; 71 N. W. Rep. 109.

⁸⁶ John V. Farwell Co. v. Wolf, *supra*. As to the power of private persons to contest the right of corporations to take and hold property, see note to Hanson v. Little Sisters of the Poor, 32 L. R. A. 293.

⁸⁷ Wolf v. Arminius Copper Mine Co., 6 Misc. (N. Y.) 562; s. c. 59 N. Y. St. Rep. 647; 27 N. Y. Supp. 642.

⁸⁸ Davis v. Lee Camp, (Va.) 18 S. E. Rep. 839.

⁸⁹ 5 Thomp. Corp., § 6131. Com-

pare Frank v. Hicks, 4 Wyo. 502; s. c. 35 Pac. Rep. 475; rehearing denied in 35 Pac. Rep. 1025,—a case relating to the *manner* in which the power was executed.

⁹⁰ A corporation organized to conduct and maintain a *race track*, which is authorized by the act under which it was organized to own such real estate as may be necessary for the transaction of its business, and to sell and dispose of the same when not required for its uses, may, where in good faith it purchases a tract larger than it requires, sell the surplus: *Lauder v. Peoria Agricultural &c. Soc.*, 71 Ill. App. 475.

⁹¹ *People v. Ballard*, 134 N. Y. 269.

a corporation, who are merely its business managers, have no power, *ex officio*, to do this.⁹²

§ 8364. **Power to Sell Its Other Property.**— The power to sell its property, lawfully acquired, which it can no longer use, would seem to be an incidental or implied power in every corporation.⁹³ But this is quite different from the power to embark its capital in an *unauthorized buying and selling*. Thus, it has been held that a corporation organized to manufacture and brew malt liquors, having its principal place of business and a licensed brewery in a certain city, where it also has a wholesale or bottler's license, has no authority to sell malt liquor not of its own manufacture, or to sell spirituous or vinous liquors anywhere.⁹⁴

§ 8365. **Power to Lease Its Land.**— Subject to the principle that a corporation having public duties to perform cannot disable itself from performing those duties without consent of the State,— a corporation, authorized by its charter to *hold* real property, may *lease* it to be used for a business which the corporation itself could not lawfully carry on. “ The right to *hold* such property includes the right to *lease* it so as to make it *produce income*. It would be too strict a construction of the statute to decide that a corporation which may lease real estate for profit can lease it only to be used in those kinds of business which it is authorized by its charter to carry on.”⁹⁵ Even where such a lease is *ultra vires*, provided that it is not so in the sense of being *malum in se*, it will be enforced in so far as it has been *executed on one side*, on the principle elsewhere considered;⁹⁶ so that where the lessee has taken possession, the corporation may recover rent earned under the lease.⁹⁷ The *directors* of a corporation which has been unsuccessfully carrying on the business for which it was organized may, with the consent of the majority of the stockholders, validly lease the plant of the corporation for ten years with the privilege of purchase, to another corpora-

⁹² Abbott v. Hard Rubber Co., 33 Barb. (N. Y.) 580.

⁹³ Dupee v. Boston Water Power Co., 114 Mass. 37, 43.

⁹⁴ Pittsburgh Pure Beer Brew. Co.'s Petition, 7 Pa. Dist. Rep. 233; s. c. 1 Dauph. Co. Rep. (Pa.) 102.

⁹⁵ Nye v. Storer, 168 Mass. 53; s. c. 6 Am. & Eng. Corp. Cas. (N. S.) 247; 46 N. E. Rep. 402.

⁹⁶ *Ante*, § 8322.

⁹⁷ Bath Gas Light Co. v. Claffy, 56 N. Y. St. Rep. 426; s. c. 26 N. Y. Supp. 287; s. c. *aff'd*, 151 N. Y. 24.

tion carrying on the same business, even though a minority of the stockholders object thereto.⁹⁸

§ 8366. **Power to Enter into Covenant to Insure Leased Property.**—A railroad company which has *power to take* a lease of a hotel at one of its *termini* as a summer resort, has power to enter into the usual covenant to keep it *insured*.⁹⁹

§ 8367. **Power to Spend Money in Improving Its Real Property.**—A national bank, empowered by its charter to provide the real estate “necessary for its immediate accommodation in the transaction of its business,” cannot interpose the defense of *ultra vires* to a contract made by it to secure the free entrance of *light* and *air* into its bank building.¹⁰⁰

§ 8368. **Power to Improve the Property of Others to Enhance Its Own.**—A corporation organized to buy, own and sell real estates and personal property, and to improve the same, may, as an act tending to improve or enhance the value of its property, contract to build a college building upon a small portion of its lands, and turn the same over to a corporation to be organized.¹⁰¹ Where a manufacturing corporation has acquired a tract of land in the vicinity of its plant, it may make such expenditures for street improvements, sewers, etc., as will make it more desirable as residence property for its employees.¹⁰² It may, moreover, make moderate expenditures or contributions towards churches, schools, libraries, public baths, etc., in the neighborhood of its manufacturing plant, peopled largely by its employees.¹⁰³

§ 8369. **Power to Expend Money for Collateral Objects to Improve Its Property or Business.**—The courts are liberal in upholding the power of corporations to employ their funds in the aid of collateral objects for the purpose of improving their own property or business. A trading corporation may, for example, subscribe to a fund to

⁹⁸ *Bartholomew v. Derby Rubber Co.*, 69 Conn. 521; s. c. 38 Atl. Rep. 45.

⁹⁹ *Jacksonville &c. Nav. Co. v. Hooper*, 160 U. S. 514; s. c. 40 L. ed. 515; 16 Sup. Ct. Rep. 379.

¹⁰⁰ *Newark First Presby. Church v. National State Bank*, 57 N. J. L. 27; s. c. 29 Atl. Rep. 320.

¹⁰¹ *Fulton v. Sterling Land & Inv. Co.*, 47 Kan. 621; s. c. 28 Pac. Rep. 720.

¹⁰² *Steinway v. Steinway & Sons*, 17 Misc. (N. Y.) 43; s. c. 40 N. Y. Supp. 718.

¹⁰³ *Steinway v. Steinway & Sons*, 17 Misc. (N. Y.) 43; s. c. 40 N. Y. Supp. 718.

secure the site of the post-office in a building adjoining its own building;¹⁰⁴ a hotel company may subscribe for the establishment of an international military encampment in the city;¹⁰⁵ and an Odd Fellows hall association, owning a hall the lower portions of which are let out, may confer upon an adjoining property-owner the right to use an alley on its premises.¹⁰⁶

§ 8370. **Land Companies May Make what Contracts, and what Not.**—What contracts “land companies” or “land improvement companies” may enter into have been the subject of several decisions which can only be barely indicated here. Power has been conceded to such a company to enter into a contract to repurchase with a third person portions of land which it had sold and upon which it had taken back mortgages, and to share the profits and the loss with him, the object being to protect itself from loss upon its securities.¹⁰⁷ But an agreement by such a company to pay for “organizing two stock companies to locate and carry on business on the land of the corporation,” is *ultra vires* and void; yet if the contract has been executed and the corporation has received the benefit, it is, on a principle elsewhere considered,¹⁰⁸ estopped from availing itself of this defense.¹⁰⁹ A corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses the incidental power to incur a liability for *building a bridge* to secure better facilities for transit to and from the lots or lands, which it is its business to acquire and dispose of.¹¹⁰

¹⁰⁴ B. S. Green Co. v. Blodgett, 159 Ill. 169; s. c. 42 N. E. Rep. 176.

¹⁰⁵ Richelieu Hotel Co. v. International Military Encamp. Co., 140 Ill. 248; s. c. 11 Ry. & Corp. L. J. 163; 29 N. E. Rep. 1044; s. c. aff'd, 41 Ill. App. 268.

¹⁰⁶ Odd Fellows' Asso. v. Hegele, 24 Or. 16; s. c. 32 Pac. Rep. 679. Circumstances under which a landowner may discontinue a street and convey the fee of the land therein to the adjacent owner in consideration of being released from liability to make the streets; Thompson v. Stevenson, 155 Mass. 554; s. c. 30 N. E. Rep. 75.

¹⁰⁷ Bates v. Coronado Beach Co., 109 Cal. 160; s. c. 41 Pac. Rep. 855.

¹⁰⁸ Ante, § 8321.

¹⁰⁹ Schurr v. New York &c. Invest. Co., 45 N. Y. St. Rep. 645; s. c. 18 N. Y. Supp. 454; aff'd s. c. 41 N. Y. St. Rep. 90; s. c. 16 N. Y. Supp. 210. For a long detail of circumstances under which a land company held about \$7,000,000 worth of lands which had been conveyed to it by a railroad company, in trust for its scrip-holders, see Rogers v. New York &c. Land Co., 134 N. Y. 197; s. c. 48 N. Y. St. Rep. 263; 32 N. E. Rep. 27.

¹¹⁰ Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294; s. c. 38 L. ed. 167; 14 Sup. Ct. Rep. 339; 44 Am. & Eng. Corp. Cas. 604.

ARTICLE IV. POWERS RELATING TO BUSINESS.

SECTION	SECTION
8373. Power to make contracts extending beyond expiration of charter.	tion of two railroad companies.
8374. Power to purchase materials for manufacture.	8380. Corporations cannot enter into partnerships.
8375. Insurance company may pay a loss not within the terms of the policy.	8381. Various contracts which cannot be made.
8376. Incorporated collection agencies may employ lawyers.	8382. Power to increase capital does not authorize enlargement of sphere of business.
8377. Power to make a contract of warranty.	8383. Engage in "truck store" business through their stockholders.
8378. Railroad company may maintain summer hotel.	8384. Irrigation company may contract to give landowner control of flood-gates, etc.
8379. Contract for the joint opera-	

§ 8373. **Power to Make Contracts Extending beyond Expiration of Charter.**—It has been held that two railroad companies may make traffic arrangements between themselves extending for a longer period than the expiration of their charters, where the parties to the contract bind themselves to take such steps as may be necessary to continue the contract in force. The danger that one or more of the contracting parties will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of such a contract.¹¹¹

§ 8374. **Power to Purchase Materials for Manufacture.**—A power conferred upon a corporation "to work in glass," includes power to *buy* the glass.¹¹² A contract by a corporation operating cotton mills, for the *future delivery* of cotton to it, is not *ultra vires* and void, when its purpose is to advance the business of the mills and as a business precaution, although it is carried by paying *margins* from time to time.¹¹³

§ 8375. **Insurance Company May Pay a Loss not within the Terms of the Policy.**—An insurance company which has issued a

¹¹¹ Union P. R. Co. v. Chicago &c. R. Co., 163 U. S. 504, 592; s. c. 41 L. ed. 265; 16 Sup. Ct. Rep. 1173.

¹¹² Hawkes Glass Beveling &c. Co. v. Bohn Man. Co., 40 Ill. App. 649.

¹¹³ Sampson v. Camperdown Cotton Mills, 82 Fed. Rep. 833.

policy upon property subsequently destroyed, may pay a loss, although not within the terms of the policy, where such payments are within the ordinary course of business, and where the fact of the payment is a good advertisement for the company. It was so held where a gunpowder ship exploded in the Mersey, and it was attempted to enjoin the payment by the insurance company of the loss, on the ground that it was not included in the terms of the policy which it had issued on the vessel.¹¹⁴

§ 8376. **Incorporated Collection Agencies May Employ Lawyers.**—An incorporated collection agency has the power, as incidental to its business, to *employ lawyers* to conduct suits upon claims placed with it for collection, and may recover of its client for the services of a lawyer so employed.¹¹⁵

§ 8377. **Power to Make a Contract of Warranty.**—Most clearly, a corporation organized to *sell goods* may, as an incidental power, warrant the quality of the goods it sells.¹¹⁶

§ 8378. **Railroad Company May Maintain Summer Hotel.**—For a railroad company to *lease* and maintain a *summer hotel* at the seaside terminus of its railroad is not so plainly outside a charter authority to sell, lease, or buy any land or real estate necessary for its use, and to erect and maintain all convenient buildings for the accommodation and use of its passengers, that the defense of *ultra vires* can be set up against the other party to the contract.¹¹⁷

§ 8379. **Contract for the Joint Operation of Two Railroad Companies.**—A provision of a contract for the joint operation of two railroad companies, that one of them shall at all times be operated in its own interest, involves the general policy of the company and the management of its business, and its fulfillment cannot be controlled by the courts.¹¹⁸

¹¹⁴ *Taunton v. Royal Insurance Co.*, 2 Hem. & M. 135.

¹¹⁵ *Snow C. & Co. v. Hall*, 19 Misc. (N. Y.) 655; s. c. 44 N. Y. Supp. 427.

¹¹⁶ A corporation whose owners and managers agree with one who forms with them another corporation to whom the former sells meat, to give him "good goods and the best of

goods," is bound by such agreement: *Davis Provision Co. v. Fowler Bros.*, 20 App. Div. (N. Y.) 626; s. c. 47 N. Y. Supp. 205.

¹¹⁷ *Jacksonville &c. Nav. Co. v. Hooper*, 160 U. S. 514; s. c. 40 L. ed. 515; 16 Sup. Ct. Rep. 379.

¹¹⁸ *Evans v. Union P. R. Co.*, 58 Fed. Rep. 497.

§ 8380. **Corporations Cannot Enter into Partnerships.**—Corporations generally have no power to enter into partnership with individuals or other corporations, or into agreements which may create partnerships;¹¹⁹ and consequently cannot be made liable as members of partnerships.¹²⁰ This is the general rule. It is said that a corporation may become a *co-owner* with an individual in a business enterprise within the scope of its corporate powers.¹²¹ It may, for example, be a joint owner with an individual of a ferry, and there may be an accounting between them.¹²² Again, while a contract of partnership between a corporation and an individual is *ultra vires* the corporation, yet if the contract has been *executed*, and if the corporation has received the benefit of its execution, it will be required to account in equity to the other party for what is due him thereunder.¹²³

§ 8381. **Various Contracts which Cannot be Made.**—An assessment life insurance company cannot, by a contract with a trust company, divest the rights of its certificate holders in a reserve fund, without their consent.¹²⁴ A corporation chartered to *manufacture* insulated cables and wires has no power to make a contract for *laying* electric conduits in a city at a cost of \$45,000, by which it incurs the risk of damages for building, masonry, iron work, proper paving, and restoration of the streets, and all accidents occurring from the opening of the streets, although thereby a sale of \$200,000 worth of its manufactured products is effected.¹²⁵

§ 8382. **Power to Increase Capital does not Authorize Enlargement of Sphere of Business.**—An agreement by the stockholders of a railroad company, that the company may increase the capital to an amount authorized by law, does not authorize the enlargement of

¹¹⁹ *Re Insurance Policies*, (Atty.-Gen.) 7 Pa. Dist. Rep. 17; s. c. 20 Pa. Ct. Ct. 284; 4 Lack. L. News, (Pa.) 36.

¹²⁰ *Aurora State Bank v. Oliver*, 62 Mo. App. 390.

¹²¹ *Calvert v. Idaho Stage Co.*, 25 Or. 412; s. c. 36 Pac. Rep. 24. The word *partner* is a contraction of *part owner*.

¹²² *Hackett v. Multonomah R. Co.*, 12 Or. 124; s. c. 53 Am. Rep. 327.

¹²³ *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206; rev'g s. c. 6 Pa. Dist. Rep. 206.

¹²⁴ *Farmers' Loan & Co. v. Aberle*, 19 App. Div. (N. Y.) 79; s. c. 46 N. Y. Supp. 10; modifying 41 N. Y. Supp. 638; s. c. 18 Misc. (N. Y.) 257.

¹²⁵ *Safety Insulated Wire & Co. v. Baltimore*, 74 Fed. Rep. 363; s. c. 42 U. S. App. 64; 20 C. C. A. 453; s. c. on former appeal, 66 Fed. Rep. 140; 13 C. C. A. 375.

the sphere of business for which the company was formed, but only the enlargement of the capital employed in such business.¹²⁶

§ 8383. **Power of Mining Companies to Engage in "Truck Store" Business through Their Stockholders.**—That *stockholders* in a mining corporation are members of a firm running a store which sells merchandise to the miners is not *per se* a violation of the Pennsylvania Act of April 29, 1874, forbidding mining corporations to engage in buying and selling merchandise.¹²⁷

§ 8384. **Irrigation Company May Contract to Give Land Owner Control of Flood-Gates, Etc.**—A corporation organized to construct a dam and maintain a ditch for domestic, irrigation, and mechanical uses, has power to enter into an agreement with the owner of the land where the dam is to be built, that the dam shall not raise the waters above high-water mark, and that he shall have absolute control of the flood-gates and water-ways at all times, and control of the flood-gates and water-ways of the dam after July 1, in each year.¹²⁸

ARTICLE V. OTHER POWERS.

SECTION	SECTION
8387. Power to employ its funds in defending employé against action for libel.	8390. Boycotting customers not within the powers of social or benevolent corporations.
8388. Power to employ surgeons, nurses, etc., for its wounded employés.	8391. No power to create a branch corporation.
8389. When cannot employ its funds in support of a strike.	8392. Cannot cast off its public duties.
	8393. What by-laws a corporation may and may not make.

§ 8387. **Power to Employ its Funds in Defending Employee Against Action for Libel.**—It is not a misapplication of its funds for a corporation *publishing a journal* to undertake the defense of its editor when sued for a libel published therein.¹²⁹

¹²⁶ Jones v. Concord &c. R. Co., 67 N. H. 119; s. c. 38 Atl. Rep. 120; 7 Am. & Eng. Corp. Cas. (N. S.) 396.

¹²⁷ Evans v. Kingston Coal Co., 6 Kulp (Pa.) 351.

¹²⁸ Alexander v. Winters, 23 Nev.

475; s. c. 49 Pac. Rep. 116; rehearing denied in 50 Pac. Rep. 798.

¹²⁹ Breay v. Royal British Nurses Asso., (C. A.) 66 L. J. Ch. (N. S.) 587; s. c. 76 Law T. Rep. 735.

§ 8388. **Power to Employ Surgeons, Nurses, etc., for Its Wounded Employees.**—Speaking generally, railroad companies have the power, acting through their superior officers, and through their subordinate agents in case of emergency, to employ surgeons, nurses, etc., to care for their employes wounded in the line of their duty.¹³⁰ But if, acting voluntarily or gratuitously, they exercise reasonable diligence in the selection of surgeons, nurses, etc., who are of good repute in their profession, they are not answerable on the footing of *negligence* for the result of the treatment which the professional persons so employed by them may bestow on the employe.¹³¹

§ 8389. **When Cannot Employ Its Funds in Support of a Strike.**—The application of a portion of the profits of an industrial society established to carry on the trades of general dealers, manufacturers, and farmers, to a subscription to a fund for the support of workmen on a strike in its neighborhood, is not an application of them to “any lawful purpose” within the meaning of the governing statute, and may consequently be enjoined. The reason is that the “lawful purpose” referred to in the statute must be taken to mean a “lawful purpose” *ejusdem generis* with the general purposes and objects of the society as contained in its rules.¹³²

§ 8390. **Boycotting Customers not within the Powers of Social or Benevolent Corporations.**—For an incorporated plumbers’ association, composed of a number of master plumbers, to take proceedings to compel the customers of its members to pay the demands of such members, by threatening to expose their alleged delinquencies and to inform certain dealers that they owe overdue accounts, and thereby prevent them from obtaining credit in the

¹³⁰ Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492; s. c. 46 N. E. Rep. 1022; 60 Am. St. Rep. 172; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83; s. c. 50 Am. St. Rep. 313, and note; Quinn v. Railroad Co., 94 Tenn. 713; s. c. 45 Am. St. Rep. 767; Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358; s. c. 49 Am. Rep. 752; Louisville &c. R. Co. v. McVay, 98 Ind. 391; s. c. 49 Am. Rep. 770; Atlantic &c. R. Co. v. Reisner, 18 Kan. 458; Swazey v. Union Man. Co., 42 Conn.

556; Cincinnati &c. R. Co. v. Davis, 126 Ind. 99; Terre Haute &c. R. Co. v. Stockwell, 118 Ind. 98; Terre Haute &c. R. Co. v. Brown, 107 Ind. 336.

¹³¹ Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83; s. c. 50 Am. St. Rep. 313, and note; Quinn v. Railroad Co., 74 Tenn. 713; s. c. 45 Am. St. Rep. 767.

¹³² Warburton v. Huddersfield Industrial Soc., (1892) 1 Q. B. 213; s. c. aff’d in (1892) 1 Q. B. 817.

business which they are carrying on, is not germane to the purpose declared by a plumbers' supply association "of promoting pleasant relations among its members," or of "establishing and maintaining a place for social meetings," or of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business;" but such corporation may be proceeded against by *quo warranto* for such an abuse of its franchises.¹³³

§ 8391. **No Power to Create a Branch Corporation.**—A corporation has no power to organize a subordinate branch and confer upon it the attributes of a corporation, at least in the absence of authority conferred by its charter, in express terms or by necessary implication.¹³⁴ It seems that the legislature could not delegate this power to a private corporation; but as it had not attempted to do so, this question did not arise.¹³⁵

§ 8392. **Cannot Cast Off Its Public Duties.**—Corporations cannot, by any form of contract,—sale, mortgage, lease,¹³⁶ or otherwise,—cast off the public duties which they have undertaken by accepting their charters or by organizing for public or *quasi*-public purposes under general enabling statutes,—without the consent of the State. Consequently, a corporation cannot alien, mortgage, lease or otherwise dispose of any franchise needful in the performance of its obligations to the State, without legislative consent.¹³⁷

§ 8393. **What By-Laws a Corporation May and May not Make.**—Every corporation has an implied or inherent power to make

¹³³ Hartnett v. Plumbers' Supply Asso., 169 Mass. 229; s. c. 38 L. R. A. 194; 47 N. E. Rep. 1002; 7 Am. & Eng. Corp. Cas. (N. S.) 183. Compare as to boycotting, Bohn Man. Co. v. Hollis, 54 Minn. 223; s. c. 21 L. R. A. 337; Casey v. Typographical Union, 45 Fed. Rep. 135; s. c. 12 L. R. A. 193, and note; Coeur d'Alene Consol. Mining Co. v. Miners Union, 51 Fed. Rep. 260; s. c. 19 L. R. A. 382; Toledo &c. R. Co. v. Pennsylvania Co., 54 Fed. Rep. 730; s. c. 19 L. R. A. 387, 395; Waterhouse v. Comer, 55 Fed. Rep. 149; s. c. 19 L. R. A. 403; Lucke v. Clothing Cutters &c. Assembly, 77 Md. 396; s. c. 19 L. R. A. 408; Cote v. Murphy, 159 Pa. St. 420; s. c. 23 L. R. A. 35; Jackson v. Stanfield, 137 Ind. 592; s. c. 23 L. R. A. 588; Boysen v. Thorn, 98 Cal. 578; s. c. 21 L. R. A. 233, and note.

¹³⁴ Lagrone v. Timmerman, 46 S. C. 372, 410; s. c. 26 Ins. L. J. 15; 3 Am. & Eng. Corp. Cas. (N. S.) 510; 24 S. E. Rep. 290.

¹³⁵ Lagrone v. Timmerman, *supra*.

¹³⁶ Smith v. Cornelius, 41 W. Va. 59; s. c. 30 L. R. A. 747; 23 S. E. Rep. 599.

¹³⁷ Stockton v. Central R. Co., 50 N. J. Eq. 52; s. c. 17 L. R. A. 97; 12 Ry. & Corp. L. J. 194; 51 Am. & Eng. R. Cas. 1; 24 Atl. Rep. 964.

reasonable by-laws, consistent with its charter or governing statute, for the purpose of carrying out the ends of its creation.¹³⁸ Where the governing statute authorizes trustees of a corporation organized thereunder to make such prudential by-laws as they shall deem proper for the management of the business affairs of the company, not inconsistent with the laws of the State, the wisdom or expedience of a by-law which they may see fit to adopt is not the proper subject of a judicial inquiry, the same being not unlawful,—as, for example, a by-law investing the manager of the company with extraordinary powers.¹³⁹ On the other hand, a corporation has no right to make a by-law inconsistent with its charter, or with the general statute under which it was created, or with the law of the land.¹⁴⁰ A corporation upon which, by its charter or a general statute, power is conferred to enact by-laws for a specified purpose, cannot enact by-laws for other purposes: the governing maxim being “*expressio unius, exclusio alterius*.”¹⁴¹ For example, a by-law giving to the corporation the first right to purchase its stock when it is for sale by any of its members, is not valid under a statute specifying several objects upon which by-laws may be enacted, but making no reference to the question of transfer of its shares.¹⁴² A corporation organized for the purpose of dealing in fuel has no power to make by-laws regulating sales of fuel *by its members* in their individual business, imposing *fin*es for their violation, and *disfranchising* a member in case of his refusal to pay the fines.¹⁴³

¹³⁸ Engelhardt v. Fifth Ward Permanent Dime Sav. &c. Asso., 148 N. Y. 281; s. c. 42 N. E. Rep. 710; 35 L. R. A. 289.

¹³⁹ Burden v. Burden, 8 App. Div. (N. Y.) 160; s. c. 40 N. Y. Supp. 499.

¹⁴⁰ King v. International Bldg. &c. Union, 170 Ill. 135; s. c. 48 N. E. Rep. 677; 7 Am. & Eng. Corp. Cas. (N. S.) 526; aff'g s. c. 68 Ill. App. 640; Curry v. Claysville Cemetery Asso., 5 Pa. Super. Ct. 289; s. c. 40 W. N. C. (Pa.) 536; 28 Pitts. L. J. (N. S.)

81; Wierman v. International Bldg. &c. Union, 67 Ill. App. 550; s. c. 29 Chi. Leg. News, 163; 2 Chi. L. J. Wkly. 24.

¹⁴¹ Ireland v. Globe Milling &c. Co., 19 R. I. 180; s. c. 29 L. R. A. 429; 1 Am. & Eng. Corp. Cas. (N. S.) 480; 32 Atl. Rep. 921.

¹⁴² Ireland v. Globe Milling &c. Co., *supra*.

¹⁴³ Kolff v. St. Paul Fuel Exch., 48 Minn. 215; s. c. 50 N. W. Rep. 36.

CHAPTER CXXIII.

LIABILITY OF CORPORATIONS FOR TORTS AND CRIMES.

SECTION	SECTION
8395. Liability of corporations for torts.	8398. Criminal liability of corporations.
8396. Liability for false imprisonment.	8399. Usurpation of powers to the injury of private persons.
8397. Liability for boycotting.	

§ 8395. **Liability of Corporations for Torts.**—Corporations are liable for the wrongs committed by them through their authorized agents under substantially the same conditions as those which govern the liability of natural persons.¹ This liability arises where the officer or agent committing the wrong is acting within the general scope of his duties,² although the act may be foreign to the object for which the corporation was created, or in excess of its granted powers.³ For example, an *educational* corporation engaged in operating a public *ferry* carrying passengers for hire, cannot escape liability for negligence in the management of the ferry, on the ground that the business is *ultra vires*.⁴ So, a banking corporation carrying out on its part a *conspiracy* between its president and a merchant, whereby the latter is to purchase goods on credit, and the bank is to lend him an amount much less than their value, and take a chattel mortgage on the entire stock for a large sum, and sell the goods under the mortgage, and divide the proceeds with the mortgagor, leaving the creditors unpaid,—is liable as a tort-feasor to a creditor so defrauded.⁵ So, a corporation may become liable in damages for a *conspiracy* to increase its capital stock for a fraudulent purpose.⁶ So, where the *presi-*

¹ Johnston Fife Hat Co. v. National Bank, 4 Okla. 17; s. c. 44 Pac. Rep. 192; 3 Am. & Eng. Corp. Cas. (N. S.) 307.

² Fitzgerald v. Fitzgerald & Co. Constr. Co., 41 Neb. 374; s. c. 59 N. W. Rep. 838; Conway v. New Orleans & C. R. Co., 46 La. An. 1429.

³ Johnston Fife Hat Co. v. National Bank, *supra*.

⁴ Nims v. Mt. Hermon Boys' School, 160 Mass. 177; s. c. 22 L. R. A. 364; 44 Am. & Eng. Corp. Cas. 357; 35 N. E. Rep. 776.

⁵ Johnston Fife Hat Co. v. National Bank, 4 Okla. 17; s. c. 44 Pac. Rep. 192; 3 Am. & Eng. Corp. Cas. (N. S.) 307.

⁶ Dorsey Machine Co. v. McCaffrey, 139 Ind. 545.

dent of a corporation, acting within the general scope of his authority and in furtherance of the interests of the corporation, *conspires* with its other officers to obtain possession of premises leased by it, and to drive the lessee out of business and ruin him, and maliciously and oppressively uses the process of the courts for that purpose, and the corporation *ratifies* his malicious and oppressive acts, it will be liable both for actual and exemplary damages.⁷ Nor is the corporation the less liable because the act involves a guilty *scienter*, or *express malice* on the part of the officer by whose agency it is committed, provided he acts for the corporation and within the general scope of his powers.⁸ For example, a general manager and agent of a foreign corporation, having general control of its business in the State and employing all its agents and other employes doing business for it therein, is not merely its servant or agent, but represents it in its corporate capacity; and it is liable for his acts in wrongfully and maliciously suing out an *attachment* for an indebtedness due to it.⁹ So, a corporation may be liable in damages for a *false imprisonment*, although, in order to sustain an action against it for this cause, it is necessary to prove a malicious intent.¹⁰ The same principle makes a corporation libel for the *frauds* committed by its officers or agents when acting for it within the general scope of their authority.¹¹ For example, it is bound by the *false representations* of its agents whereby third persons are induced to subscribe for its capital stock to their damage.¹² The Supreme Court of

⁷ Texas &c. Coal Co. v. Lawson, 10 Tex. Civ. App. 491.

⁸ Johnston Fife Hat Co. v. National Bank, 4 Okla. 17; s. c. 44 Pac. Rep. 192; 3 Am. & Eng. Corp. Cas. (N. S.) 307; Fitzgerald v. Fitzgerald &c. Constr. Co., 44 Neb. 463.

⁹ Emerson &c. Co. v. Skidmore, 7 Tex. Civ. App. 641; s. c. 25 S. W. Rep. 671.

¹⁰ Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426; s. c. 21 L. R. A. 278. In this case it was held that the cashier of a bank is presumed to have had authority from the directors to direct the commencement of a libel suit by *capias*, where the regular attorneys of the bank conduct the suit, one of them being a director, and where the bank pays the expenses of the suit and also the expenses of an application for a mandamus to set

aside an order of court quashing the *capias*.

¹¹ Fitzgerald v. Fitzgerald &c. Constr. Co., 44 Neb. 463.

¹² Zang v. Adams, 23 Colo. 408; s. c. 48 Pac. Rep. 509. So, a corporation is liable for the loss suffered by one who accepts its stock certificates as security for a loan in reliance upon the *statements* of its secretary, treasurer, and transfer agent, authorized to countersign, seal, and issue new certificates of stock in exchange for old certificates transferred, upon the signing of the new certificates by its president,—that such certificates of stock are all right: New York Fifth Ave. Bank v. Forty-second Street &c. R. Co., 44 N. Y. St. Rep. 379; s. c. 17 N. Y. Supp. 826. But a corporation cannot be made liable for loss caused by the false representa-

Georgia, while admitting that a corporation may be liable for a libelous publication,¹³ nevertheless hold that a corporation is not liable for damages resulting from the *speaking* of false, malicious, or defamatory words by one of its agents, although such agent was acting for the benefit of the corporation and within the scope of his duties, unless he was expressly directed or authorized by the corporation to speak the words in question.¹⁴ Another court has held that a corporation is not liable for a libelous publication by its agent having only ordinary business authority, although it relates to its business, if not expressly authorized or within the scope of the agent's authority.¹⁵

§ 8396. **Liability for False Imprisonment.**— A corporation may be liable in damages for false imprisonment, even though a malicious intent is necessary to be proved.¹⁶ But a corporation is not liable for a false arrest and imprisonment made by its superintendent, in the absence of evidence tending to show a previous authorization or subsequent ratification.¹⁷

§ 8397. **Liability for Boycotting.**— For an incorporated association of dealers in a particular kind of goods officiously and without right to undertake to notify persons engaged in selling the same kind of goods to the delinquent customers of the former, that the latter have not paid their accounts thereby debarring them from obtaining goods on credit, is an offense for which they are liable to a forfeiture of their franchise in a proceeding instituted for that purpose.¹⁸

§ 8398. **Criminal Liability of Corporations.**— It is probably true that a corporation can be indicted, the same as a natural person can, for any public offense which it can commit in its corporate

tions of its officers concerning a matter about which they are not shown and cannot be presumed to have had any authority from the corporation to make any representations whatsoever: *Schubart v. Chicago Gas Light & Co.*, 41 Ill. App. 181.

¹³ *Howe Machine Co. v. Souder*, 58 Ga. 65.

¹⁴ *Behre v. National Cash Register Co.*, 100 Ga. 213; s. c. 7 Am. & Eng. Corp. Cas. (N. S.) 337; 27 S. E. Rep. 986.

¹⁵ *Aetna L. Ins. Co. v. Paul*, 37 Ill. App. 439.

¹⁶ *Wachsmuth v. Bank*, 96 Mich. 426; s. c. 21 L. R. A. 278; 56 N. W. Rep. 9.

¹⁷ *Central R. Co. v. Brewer*, 78 Md. 394; s. c. 27 L. R. A. 63; 28 Atl. Rep. 615. See also *Carter v. Howe Sewing Machine Co.*, 51 Md. 290.

¹⁸ *Hartnett v. Plumbers' Supply Assn.*, 169 Mass. 229; s. c. 38 L. R. A. 194; 47 N. E. Rep. 1002; 7 Am. & Eng. Corp. Cas. (N. S.) 183.

character.¹⁹ In a case not officially reported, the Court of Appeals of Kentucky, speaking through Holt, C. J., discuss at considerable length the subject of the indictment of corporations, with the conclusion that a corporation is indictable for any criminal offense which it can commit in its aggregate character, and which is punishable *by fine*; since a corporation, being an intangible body, cannot be imprisoned.²⁰ A banking corporation may therefore be indicted for *usury*,²¹ and a *national bank* for violating the usury laws of the State.²² An agricultural fair association may be indicted for keeping a disorderly house,²³ or for permitting gaming upon its fair grounds.²⁴ Unless the statute law provides otherwise, the procedure is the same as in the case of the indictment of natural persons, except that there can, of course, be no arrest or the giving of bail.²⁵

§ 8399. Usurpation of Powers to the Injury of Private Persons.—

A serious usurpation by a corporation of powers not conferred by law, to the injury of private person, may afford ground for a proceeding by *quo warranto* to forfeit its charter,—as the *boycotting* of the private customers of its members.²⁶

¹⁹ State v. First Nat. Bank, 2 S. Dak. 568; s. c. 6 Bkg. L. J. 302; 45 Alb. L. J. 333; 11 Ry. & Corp. L. J. 200; 51 N. W. Rep. 587.

²⁰ Commonwealth v. Pulaski County &c. Asso., 13 Ky. L. Rep. 468; s. c. 17 S. W. Rep. 442.

²¹ State v. Security Bank, 2 S. Dak. 538; s. c. 51 N. W. Rep. 337.

²² State v. First National Bank, *supra*.

²³ State v. Pulaski County &c. Association, *supra*.

²⁴ State v. Passaic County Agr. Soc., 54 N. J. L. 260; s. c. 11 Ry. & Corp. L. J. 178; 23 Atl. Rep. 680.

²⁵ State v. Security Bank, *supra*.

²⁶ Hartnett v. Plumbers' Supply Asso., 169 Mass. 229; s. c. 38 L. R. A. 194; 47 N. E. Rep. 1002; 7 Am. & Eng. Corp. Cas. (N. S.) 183.

TITLE TWENTY-TWO.

RECENT DECISIONS ON THE CONTRACTS
OF CORPORATIONS.



TITLE TWENTY-TWO.

RECENT DECISIONS ON THE CONTRACTS OF CORPORATIONS.

CHAPTER.

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CHAPTER CCXIV.

FORMAL MODES OF CORPORATE ACTION.

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§ 8401. Place of Dwelling and of Doing Corporate Acts.— In the absence of a statutory authorization, the general rule is that a corporation has no power to perform strictly corporate acts outside the State of its creation.¹ Where an incorporated mutual benefit society had, by its governing statute, fixed its principal office at the place designated in its articles of association, it was held that such principal office could not be changed so as to bind the members of the society, without the amendment of both its governing statute and its articles of association. A benefit society organized under any law in Illinois, which has applied for permission to continue business under the Act of 1893 of that State concerning benefit societies,² is prohibited by section 10 of that act from changing the location of its principal office at a meeting held in another State; and it may be enjoined at the suit of a member from consummating such removal.³ In New Jersey a corporation whose certificate of incorporation provides that business is to be conducted in a specified place, but contains no limitation on the power of removal, cannot be restrained from changing the place of business to another place in the State, but may be restrained from removing from the State, where the certificate provides for the location of its business within the State.⁴ A California corporation organized under the laws of that State, whose certificate of organization designates the place in the State where its business is to be carried on, and that the portion of the business to be carried on out of the State is the “selling of the manufactured products,” of the corporation,—is not authorized to remove the manufacturing plant outside the State, although not provided for in the certificate of incorporation.⁵ A corporation created in

¹ *Bastian v. Modern Woodmen of America*, 166 Ill. 595; s. c. 46 N. E. Rep. 1090; rev'g s. c. 68 Ill. App. 378.

² Ill. Laws, 1893, p. 130.

³ *Bastian v. Modern Woodmen of*

America, 166 Ill. 595; s. c. 46 N. E. Rep. 1090; rev'g 68 Ill. App. 378.

⁴ *Stickle v. Liberty Cycle Co.*, (N. J. Ch.) 32 Atl. Rep. 708.

⁵ *Stickle v. Liberty Cycle Co.*, 32 Atl. Rep. 708; no off. rep.

Ohio, which removes its business plant and offices to another State and there does business as an Ohio corporation under a certificate of authority from such other State, may execute, in the latter State, a mortgage upon its real estate in Ohio, which, when properly recorded, will operate in Ohio as a lien thereon.⁶ It has been held in Missouri, that a corporation organized under the laws of Illinois and doing business in Missouri as well as in Illinois, may make, in Missouri, a sale of all its property outside the usual course of its trade, which will be recognized as valid in Missouri, notwithstanding a provision of the statute of Illinois by which it is governed "that the action of any meeting held beyond the limits of this State shall be void,"—where the directors who assume to make the sale hold the entire capital stock.⁷ A mortgage executed by a corporation is not rendered invalid by the fact that the business was finally *concluded* at *another place* than its regular place of business, at which its by-laws required the meetings of its trustees to be held, where it was *authorized* at a previous meeting at that place, and all the trustees were present at both meetings.⁸

§ 8402. How Far Acts of a Majority of the Stockholders Bind the Corporation.—In joint stock companies the stockholders are the ultimate constituency; whereas in corporations formed for religious, charitable, and other ideal purposes, the trustees are often the body which is incorporated. In joint stock companies, the stockholders are the corporation; they are the proprietors; they are the real parties in interest; and the directors, elected by them, are merely their agents or trustees. It is therefore a solecism to speak, as is sometimes done, about the directors ratifying the action of the stockholders. Where the stockholders have lawfully authorized an act, the subsequent action of the directors is merely necessary to give formal effect to what the stockholders have resolved to do. The stockholders may, and often do ratify the informal or unauthorized acts of the directors; but it is as much an inversion of correct ideas to say that the action of the directors is necessary to ratify the acts of the stockholders, as it is to say that the action of an agent is necessary to ratify the act of his prin-

⁶ Lattimer v. Mosaic Glass Co., 13 Ohio C. C. 163.

⁸ Vincent v. Snoqualmie Mill Co., 7 Wash. 566; s. c. 35 Pac. Rep. 396.

⁷ Union Nat. Bank v. Shoemaker, 68 Mo. App. 592.

cial, or that the action of a servant is necessary to ratify the act of his master. It remains true, however, that the directors are the governing body, when sitting together as a board, in all matters pertaining to the business corporation,—in general, in all save what may be termed constituent matters. Individual stockholders, as we have seen,⁹ or a majority of them, have no agency for the corporation unless specially appointed its agents. A single stockholder cannot make a contract for the corporation which will bind it in the absence of a ratification, merely because he owns a majority of the shares, which ownership gives him the power to select and control the board of directors;¹⁰ though such a contract may be made binding upon the corporation by a subsequent ratification.¹¹ A contract made by the holder of a majority or most of the shares of a corporation, without disclosing that the person signing the contract acted as agent for the corporation, may nevertheless be shown by evidence *aliunde* to have been intended as a corporate contract, and may be specifically enforced in equity as such against the corporation.¹²

§ 8403. **Validity of Contracts Made by the Sole Owner or Owners of All the Shares.**—But, in the absence of what is called constituent corporate action, giving effect to it, it has been held that a disposition of the corporate property by stockholders owning all the shares does not create a contract which will be specifically enforced in equity.¹³ The decisions leave the subject in a confusion which is not creditable to the courts. The highest court in the Union denies the validity of the action of all the stockholders in transferring the property of the corporation without what is called “corporate action,” that is, the formal action of the directors, the chosen servants of the stockholders.¹⁴ In a subsequent case in the same court, where a contract was challenged by a railroad company which had entered into it, on the ground that, although authorized by its stockholders and by the so-called

⁹ 4 Thomp. Corp., § 4875.

¹⁰ Jones v. Williams, 139 Mo. 1; s. c. 37 L. R. A. 682; 39 S. W. Rep. 486; 40 S. W. Rep. 353; 61 Am. St. Rep. 436; 6 Am. & Eng. Corp. Cas. (N. S.) 734; *Allemong v. Simmons*, 124 Ind. 199.

¹¹ Jones v. Williams, *supra*.

¹² Jones v. Williams, *supra*.

¹³ Sellers v. Greer, 172 Ill. 549; s. c.

50 N. E. Rep. 246; 40 L. R. A. 589; rev'g s. c. 64 Ill. App. 505. See also *Humphreys v. McKissock*, 140 U. S. 304; s. c. 35 L. ed. 473; *England v. Dearborn*, 141 Mass. 590; *Newton Man. Co. v. White*, 42 Ga. 148; *Russell v. M'Lellan*, 14 Pick. (Mass.) 63. ¹⁴ *Humphreys v. McKissock*, 140 U. S. 304.

“executive committee” of its directors, yet its directors, as a board, had never authorized it to be executed, the contention was overruled, and Mr. Chief Justice Fuller, in giving the opinion of the court, placed its conclusion upon the true ground, namely, that the stockholders were the corporation. He said: “When, by the charter of a corporation, its powers are vested in its stockholders, and this was the common-law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders.”¹⁵ If, then, the ultimate determination of corporate affairs rests with the stockholders, it is quite absurd to say that their acts are not to be deemed valid unless assented to by their agents, the directors. If, as we shall see, informal acts of the directors and the corporate officers may be ratified and made good by the subsequent conduct or acquiescence of the stockholders,¹⁶ whose agents the former are, why can they not, at least by unanimous consent, do a valid corporate act without the formality of a resolution by their servants, the directors? The sound answer is that they can. On this ground, it was well held that where the directors own all the shares, they may agree among themselves — not in their character of directors, but rather in their character of stockholders — to authorize the president to sell all the property of the corporation, and that this authorization will be none the less valid because not given at a regular directors’ meeting.¹⁷ Other decisions tend to the conclusion that whilst, in theory of law, the corporation and its shareholders are distinct persons, and the latter have no agency for the former,¹⁸ yet equity, which looks to the substance of things, may, in an appropriate case, and for the purposes of justice, treat a debtor corporation and an individual owner of all its shares as identical.¹⁹ A sole stockholder may make a mortgage of the corporate property to which effect will be given in equity.²⁰ The sole owner of the shares

¹⁵ *Union Pac. R. Co. v. Chicago & C. R. Co.*, 163 U. S. 564–596; s. c. 16 Ssp. Ct. Rep. 1173; 41 L. ed. 611; aff’g s. c. 47 Fed. Rep. 15; 10 Rail. & Corp. L. J. 283; 47 Am. & Eng. R. Cas. 340; and (in the Circuit Court of Appeals) 51 Fed. Rep. 309. That the act of all or a majority of the stockholders may be regarded as the act of the corporation, for which it will be answerable, to the extent of a forfeiture of its franchises,—see *State v. Standard Oil Co.*, 49 Oh. St. 137; s. c.

15 L. R. A. 145; 27 Ohio L. J. 197; 45 Alb. L. J. 378; 11 Rail. & Corp. L. J. 229; 30 N. E. Rep. 279; 36 Am. & Eng. Corp. Cas. 1.

¹⁶ *Post*, § 8437.

¹⁷ *Jordan v. Collins*, 107 Ala. 572.

¹⁸ *Moore & C. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; s. c. 13 Am. St. Rep. 23.

¹⁹ *Pott v. Schmucker*, 84 Md. 535; s. c. 57 Am. St. Rep. 415.

²⁰ *Swift v. Smith*, 65 Md. 428; s. c. 57 Am. Rep. 336.

of a corporation, who continues to carry on the business in the corporate name, is not, in the view of another court, personally liable on indorsements on drafts made by him in the name of the corporation, where no fraud is practiced, and all the parties to the transaction act in the belief that the corporation alone is liable.²¹

§ 8404. Assent of Stockholders to Mortgages.—Statutes for the protection of stockholders have been enacted requiring the consent in writing of a prescribed number or value of them to the execution of a mortgage upon corporate property. It is not necessary to say that unless such a statute is complied with, or its protection waived by the stockholders, a mortgage upon corporate property will be voidable, in the absence of circumstances of estoppel.²² Such a statute being designed for the protection of stockholders merely, they alone, and not the creditors, can take advantage of its provisions.²³ As the statute is enacted for the benefit of stockholders, they may *wave* compliance with the formalities of notice to them before the creation of a mortgage upon corporate property, either expressly, or by failing to object to an agreement for the mortgage, or by continuing to use the property obtained under such agreement.²⁴ Such a statute is not applicable to mortgages given in fulfillment of a valid and obligatory contract so to do, made upon a full and valuable consideration *before the statute* was passed.²⁵ A statute forbidding corporations to mortgage, convey, or pledge their *property* for the security of debts, otherwise than by the consent of the holders of a majority of the capital stock, does not apply to the issues, output, or product of the corpo-

²¹ Louisville Banking Co. v. Eisenman, 94 Ky. 83; s. c. 42 Am. St. Rep. 335, note. See also Duggan v. Pacific Broom Co., 6 Wash. 593; s. c. 36 Am. St. Rep. 182, and note. That a provision for *government directors* of the Union Pacific Railroad Company does not take that corporation out of the general rule giving stockholders final control of corporate affairs in the absence of a charter limitation, see Union Pacific R. Co. v. Chicago & C. R. Co., 163 U. S. 564. A resolution of a mutual fire insurance corporation, adopted by a *unanimous* vote of the members, may be repealed by a subsequent resolution *not unanimous*:

McKean v. Philadelphia Contribution-ship, 6 Pa. Dist. Rep. 40; s. c. 18 Pa. Co. Ct. 657.

²² The Vigilancia, 73 Fed. Rep. 452; s. c. 38 U. S. App. 563; 19 C. C. A. 528; aff'd 68 Fed. Rep. 781.

²³ Market & c. Nat. Bank v. Jones, 7 Misc. (N. Y.) 207; s. c. 53 N. Y. St. Rep. 37; 27 N. Y. Supp. 677; aff'd, 90 Hun, 605; s. c. 35 N. Y. Supp. 1111; Alabama Iron & c. Co. v. McKeever, 112 Ala. 134; s. c. 20 South. Rep. 84.

²⁴ Bridgeport Electric & c. Co. v. Meader, 72 Fed. Rep. 115, 120; s. c. 30 U. S. App. 580; 18 C. C. A. 451.

²⁵ The Vigilancia, 68 Fed. Rep. 781; s. c. aff'd in 73 Fed. Rep. 452.

rate business, but only to the *corpus* of the corporate property.²⁶ A corporation which has parted with all its interest in the property conveyed by a mortgage, cannot afterwards contest its validity on the ground that the statutory consent of the requisite number of stockholders was not obtained.²⁷

§ 8405. **Assent of Stockholders to Other Contracts.**—The exercise of a statutory power of a railroad company to guarantee the bonds of a connecting line, is not such a change in the purpose and object of the corporation as to be *fundamental* and to require the assent of the stockholders, but may be had by action of the board of directors.²⁸ The debts of a manufacturing corporation accruing in the ordinary course of its business in the employment of labor and the purchase of materials, do not constitute such an indebtedness as requires a previous meeting and sanction of stockholders under the requirements of a statute.²⁹

§ 8406. **Inherent Power of Corporations to Appoint Agents.**—As a corporation can act only through agents, it follows that every corporation has the implied power to appoint appropriate agents through whom to do its lawful and proper business; and the acts of such agents, done within the powers of the corporation, will be valid and binding upon it, the same as the acts of the agents of individuals or partnerships would be.³⁰ A trading or manufacturing corporation, until its charter is annulled in a *quo warranto* proceeding, has the same authority as an individual trader or manufacturer has, to sell or consign its goods, to select its

²⁶ Alabama Iron &c. Co. v. McKeever, 112 Ala. 134; s. c. 20 South. Rep. 84. 58 Fed. Rep. 286; s. c. 22 L. R. A. 817; 7 C. C. A. 225.

²⁷ Beebe v. Richmond Light &c. Co., 3 App. Div. 334; s. c. 38 N. Y. Supp. 395; 73 N. Y. St. Rep. 734; aff'g 13 Misc. 737; s. c. 69 N. Y. St. Rep. 230; 35 N. Y. Supp. 1. A resolution authorizing the officers of a corporation "to secure any and all other creditors" after a person named, does not require that a mortgage executed in pursuance thereof should secure all other creditors, but the word "and" has the meaning of "or": Brown v. Grand Rapids Parlor Furniture Co., 28 Louisville Trust Co. v. Louisville &c. R. Co., 43 U. S. App. 550; 75 Fed. Rep. 433. Effect of a statute requiring the consent of a majority of the stockholders to such a guaranty: Louisville Trust Co. v. Louisville & R. Co., 75 Fed. Rep. 433; s. c. 43 U. S. App. 550. ²⁹ Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110; Quaker City Nat. Bank v. Gilkeson, 18 Pa. Co. Ct. 557. ³⁰ Hamm v. Drew, 83 Tex. 77; s. c. 17 S. W. Rep. 434.

selling agents, and to impose conditions as to when they shall sell and the terms upon which they shall sell.³¹

§ 8407. **Appointment of Agents need not be in Writing.**— Unless the statute law so provides, the appointment of the ordinary agents of corporations need not be in writing. For example, it is not necessary that the employment of a surveyor by a canal company in the matter of repairing and enlarging its canal, should be in writing, in order to render the canal company liable for the acts of a contractor employed by the surveyor to take the soil from the adjacent land; but it is sufficient if his appointment and authority to make the contract appear by oral testimony.³²

§ 8408. **Corporations Bound by the Acts of Their Authorized Agents within the Scope of the Corporate Powers and the Agents' Authority.**— Corporations are bound by the act of their agents when done (1) within the scope of the powers of the corporation, and (2), within the scope of the authority which the corporation has conferred upon the agent.³³ Applying this doctrine, it has been held that an agreement by an agent of a corporation with an attorney to whom he turns over a judgment for collection, that the attorney shall receive half the amount collected, is binding on the corporation;³⁴ that a corporation is bound by the action of its board of visitors, which it has appointed its agent for the purpose of selling certain lands, in making a sale thereof, and that no further ratification is necessary to convey a good title to the purchaser;³⁵ that a contract for the purchase of ordinary supplies, made by the purchasing agent of a railroad company designated by its by-laws as one of its officers authorized, in the conduct of its business, to purchase its supplies, is binding upon the company.³⁶

³¹ *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352; s. c. 36 Atl. Rep. 971.

³² *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; s. c. 29 L. R. A. 839; 41 Pac. Rep. 495. To the same effect, see *Williams v. Fresno Canal &c. Co.*, 96 Cal. 14; s. c. 20 Wash. L. Rep. 614; 30 Pac. Rep. 961; 31 Am. St. Rep. 172.

³³ *McCreery v. Garvin*, 39 S. C. 375; s. c. 17 S. E. Rep. 828.

³⁴ *Barbee v. Aultman*, 102 Iowa, 278; s. c. 71 N. W. Rep. 235; 7 Am. & Eng. Corp. Cas. (N. S.) 736.

³⁵ *Davis v. Lee Camp*, (Va.) 18 S. E. Rep. 839.

³⁶ *Levey v. New York &c. R. Co.*, 53 N. Y. St. Rep. 579; s. c. 24 N. Y. Supp. 124; 4 Misc. (N. Y.) 415.

§ 8409. **What Agents Deemed so Authorized.**—Where a corporation, organized for the purpose of conducting a newspaper and engaged in the prosecution of that business, duly authorized its business manager “to make the best arrangements possible for the purchase of a new press,”—it was held to be within his power to make a contract for the purchase in which the seller reserved title until the same should be paid for.³⁷ A corporation which publishes a newspaper may designate a particular person, other than its president or secretary, to act as its authorized agent in certifying to notices of publication of sales under execution contained in such paper, and the certificate of the agent so designated will satisfy the law.³⁸ It has been held that the acts of a designated person in regard to a specified matter are binding upon a corporation, where all the members of the corporation agree that the entire business in relation to such matter shall be done by such person and two others, by whom all the money for carrying out the matter is furnished, and such person is empowered by the other two to act for the three, and he does so act.³⁹ But this is doubtful. A provision of the *by-laws* of a corporation, that the treasurer, with the president or secretary, shall sign promissory notes of the corporation, does not invalidate a corporate note signed by the president only, where, with the acquiescence of the directors, he has issued other notes signed in the same manner, upon which moneys were realized and used in the business of the corporation, and where the note was issued honestly, for a worthy and necessary purpose, and is held by a *bona fide* holder.⁴⁰

§ 8410. **When not Bound by the Declarations or Admissions of Their Agents.**—A corporation is not bound by the declarations, representations, or admissions of its individual directors, officers, or agents, outside the scope of their agency or authority,⁴¹ nor when such declarations, representations or admissions are not made in the course of, or connected with the performance of their authorized duties, and so as to constitute them a part of the *res gestae*.⁴²

³⁷ Merchants' &c. Bank v. Cottrell, 96 Ga. 168; s. c. 23 S. E. Rep. 127. Co., 1 App. Div. (N. Y.) 367; s. c. 37 N. Y. Supp. 392; 72 N. Y. St. Rep. 455.

³⁸ Pentzel v. Squire, 161 Ill. 346; s. c. 43 N. E. Rep. 1064.

³⁹ Michigan Slate Co. v. Iron Range &c. R. Co., 101 Mich. 14; s. c. 59 N. W. Rep. 646.

⁴⁰ Grant v. George C. Treadwell

⁴¹ Walrath v. Champion Mining Co., 171 U. S. 293, 311; s. c. 18 Sup. Ct. Rep. 909.

⁴² Browning v. Hinkle, 48 Minn. 544; s. c. 51 N. W. Rep. 605.

§ 8411. Power of Contracting Agent to Waive Conditions of Contract Contrary to Its Provisions.—Notwithstanding a provision in a contract between a corporation and a private party, that no agent of the corporation shall have power to waive or modify the contract, an agent having authority to do so may validly waive compliance with any of its conditions.⁴³ The reason given is that such a provision, if valid, would effectually prevent any change in a contract by the parties to it; since a corporation, from its nature, can act only through agents.

§ 8412. Transactions with Corporate Officers when Acting as Individuals.—It is scarcely necessary to say that where the officers of a corporation act in a given transaction for themselves as individuals, and this is known to the other contracting party, the corporation will not be bound by the contract, although in form it purports to bind it.⁴⁴ A corporation is not chargeable with the knowledge, or bound by the acts of, one of its officers in a matter in which he acts in his own interest and deals with it as a private individual, and in no way represents it in the transaction.⁴⁵ Nor need we dwell long on such an obviously sound proposition as that the person holding the offices of secretary and treasurer of a corporation has no implied authority as such to indorse notes for his individual use.⁴⁶ On the other hand, although the form of the transaction may be such as to indicate that it is the individual debt of the president of a corporation, or an obligation given by him as receiver of another corporation, yet if, in point of fact, the money was advanced for the use of the former corporation, to be repaid out of its funds, it will be bound to make it good.⁴⁷ And, clearly, where they profess to act for the corporation, and the act is within the apparent scope of their agency, they bind the corporation, although, unknown to the other party, they may be acting for themselves individually.⁴⁸ It is held that where one who is

⁴³ *Robinson v. Berkey*, 100 Iowa, 136, 142; s. c. 69 N. W. Rep. 434; *Osborne v. Backer*, 81 Iowa, 375; s. c. 47 N. W. Rep. 70; *Peterson v. Walter A. Woods & Co. Machine Co.*, 97 Iowa, 148; s. c. 66 N. W. Rep. 96.

⁴⁴ *Edwards v. Carson Water Co.*, 21 Nev. 469; s. c. 34 Pac. Rep. 381; *Manhattan L. Ins. Co. v. Forty-second Street & Co. R. Co.*, 139 N. Y. 146; s. c. 54 N. Y. St. Rep. 474; 9 Bkg. L. J. 495; 34 N. E. Rep. 776.

⁴⁵ *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123; s. c. 58 N. W. Rep. 734.

⁴⁶ *Security Bank v. Kingsland*, 5 N. Dak. 263; s. c. 65 N. W. Rep. 697.

⁴⁷ *Lafferty v. Hall*, 19 Ky. L. Rep. 1777; s. c. 44 S. W. Rep. 426; *Staples v. Huron Nat. Bank*, 8 S. Dak. 222; s. c. 66 N. W. Rep. 314.

⁴⁸ *Oro Min. & Mill. Co. v. Kaiser*, 4 Colo. App. 219; s. c. 35 Pac. Rep. 377.

an officer of an incorporated bank, acts in a given matter in behalf of the bank, his acts are binding on the corporation, although at the same time and in the same matter, he may have been acting in his individual interest. Accordingly, the acts of an officer and director of a bank who, in a certain transaction, acted for himself in obtaining a release from liability under a judgment against him and other indorsers, and also acted for the bank in selling notes held by it to be used as offsets against the judgments, part of the proceeds of which he paid over to the bank, were held to be binding on the bank to the extent that he was acting in its behalf.⁴⁹ One who lends money to a corporation through its principal officer on the pledge of its securities as collateral, is not bound to see that the money is applied to the corporation purposes. Nor is he put upon inquiry as to whether it is a transaction of the corporation or of the officer, from the fact that the individual note of the officer is offered as additional security.⁵⁰

§ 8413. Acts of the Common Agents of Two Corporations.—The act of a common agent of two corporations, or of the members of two partnerships, or of the common agent of a corporation and a partnership, done as an officer or member of one body, is plainly not the act of the other.⁵¹ One of two railroad companies, which operate their railroads as one under a traffic contract, can recover a fund to which it is entitled but which has been expended by the joint manager for the benefit of the other company without authority under the contract or otherwise, even though such contract was *ultra vires*.⁵²

§ 8414. Identity of Two Corporations having the Same Officers and Stockholders.—The fact that two corporations—let us say a railroad company and a construction company—have mainly, though not entirely, the same officers and stockholders, does not render them legally identical, but merely requires a more careful

⁴⁹ Smith v. Wilson, 1 Tex. Civ. App. 115, 124; s. c. 20 S. W. Rep. 1119.

⁵⁰ Buffalo Loan & Co. v. Medina Gas & Co., 12 App. Div. (N. Y.) 199; s. c. 42 N. Y. Supp. 781. Compare Hanover Nat. Bank v. American Dock & Co., 75 Hun (N. Y.) 55; s. c. 56

N. Y. St. Rep. 862; 26 N. Y. Supp. 1055; aff'd, 148 N. Y. 612.

⁵¹ Cameron v. Decatur First Nat. Bank, 4 Tex. Civ. App. 309; s. c. 23 S. W. Rep. 334; 2 Bates Part., p. 809.

⁵² Nashua & C. R. Corp. v. Boston & C. R. Corp., 164 Mass. 222; s. c. 49 Am. St. Rep. 454; 41 N. E. Rep. 268.

scrutiny of their dealings with each other, where the rights of third persons are concerned.⁵³

§ 8415. **Implied Obligation of Corporation to Pay for Benefits Knowingly Received without Objection.**—If a corporation knowingly receives benefits from another person without objection, and knowing that the person rendering such benefits does so under the expectation of reasonable compensation therefor, it will be liable to pay the reasonable value of those services on an *implied assumpsit*: such as extra work done upon its building by a contractor;⁵⁴ or the services of an attorney.⁵⁵ Thus, a corporation was held liable for the value of extra work done by a contractor under orders of a director who promised that the company will pay for it, although the director acted without authority, where a majority of the directors knew that the contractor was doing the work, and that he had refused to do it without extra pay, and the company received and retained the benefit. The decision was made to rest upon the implied obligation or duty of the corporation to pay for the benefit which it had, without objection, received.⁵⁶

§ 8416. **Conveyances to Corporations.**—Although a deed of a *foreign corporation* may have been *executed* before the corporation filed its articles in the domestic State so as to be entitled under the laws thereof to act as a corporation therein,—yet, as a deed takes effect only from *delivery*, the conveyance will be good if the articles were filed before the deed was delivered.⁵⁷

§ 8417. **Other Modes of Devolving Title to Land upon Corporations.**—A resolution by the authorized delegates of a religious society, providing that all property held by the church in the name of any person or persons, as trustees or otherwise, shall vest in a corporation whose articles of association are presented to and adopted by such delegates, and requiring all persons holding such

⁵³ Davidson v. Mexican Nat. R. Co., Y. St. Rep. 18; 26 N. Y. Supp. 474; 58 Fed. Rep. 653.

⁵⁴ Tryon v. White & c. Co., 62 Conn. 161; s. c. 20 L. R. A. 291; 25 Atl. Rep. 712; 7 Am. R. & Corp. Rep. 7.

⁵⁵ Prindle v. Washington L. Ins. Co., 73 Hun (N. Y.) 448; s. c. 56 N. Y. St. Rep. 18; 26 N. Y. Supp. 474; s. c. aff'd, 149 N. Y. 614.

⁵⁶ Tryon v. White & c. Co., 62 Conn. 161; s. c. 20 L. R. A. 291; 25 Atl. Rep. 712; 7 Am. R. & Corp. Rep. 7.

⁵⁷ Sayward v. Gardner, 5 Wash. 247; s. c. 31 Pac. Rep. 761.

property to convey the same to the corporation, which is to succeed to all property owned by the church or held for its use,—constitutes a transfer by the members of the church association of their equitable interest in the property.⁵⁸ A resolution of an unincorporated *alumni* association, appointing a committee to incorporate the association, is sufficient to vest in the corporation created in pursuance thereof all the title and interest which the association had in a fund which it had donated to the *alma mater*, and entitles the corporation to insist upon the observance of the conditions accompanying the gift.⁵⁹

⁵⁸ Reorganized Church of Jesus Christ v. Church of Christ, 60 Fed. Rep. 937.

⁵⁹ Associate Alumni v. General Theological Seminary, 26 App. Div. (N. Y.) 144; s. c. 49 N. Y. Supp. 745. Right of a corporation organized from

several unincorporated societies to have trustees convey a building belonging to such association to it: Organized Labor Hall v. Gebert, 48 N. J. Eq. 393; s. c. 35 Am. & Eng. Corp. Cas. 367; 22 Atl. Rep. 578.

CHAPTER CCXV.

FORMAL REQUISITES OF CORPORATE CONTRACTS.

SECTION	SECTION
8420. Use of the corporate seal.	8425. Formalities in the execution of written instruments.
8421. Presumption in the case of the formal execution of a sealed instrument.	8426. Invalidity of promissory notes executed by a part only of the joint authorized agents.
8422. When stranger may presume that formalities have been complied with.	8427. Contracts signed by agent in his own name and without disclosing agency.
8423. Variance between the authorizing instrument and the contract as made.	8428. Contract signed with individual name and official addition deemed the contract of the corporation.
8424. When formal resolution of directors dispensed with.	

§ 8420. Use of the Corporate Seal.—The courts are uniting on the rule that a corporation may make, without the use of its corporate seal, any contract which an individual may make without the use of his seal,¹—as, for example, a bill of sale of personal property;² or a contract of subscription to a fund to purchase a post-office site;³ or a guaranty of the performance by a lessee of the covenants of a lease;⁴ or a contract to perform work and labor of a particular kind, such as sinking a well.⁵ The Supreme Court of North Carolina still sticks in the ancient wax⁶ to the extent of holding that a deed executed in the name of a corporation by its president with the word “seal” at the end of the signature is not a good execution either at common law or under N. C. Code, § 685, concerning the manner of the execution of deeds by corporations. The court, ignoring the plain intent of the parties, perverted justice

¹ Winterfield v. Cream City Brew. Co., 96 Wis. 239; s. c. 71 N. W. Rep. 101; 7 Am. & Eng. Corp. Cas. (N. S.) 353; National Protective Asso. v. Prentice Brown Stone Co., 49 Minn. 220; s. c. 51 N. W. Rep. 916; 21 Ins. L. J. 838; McCullough v. Hartford F. Ins. Co., 2 Super. Ct. (Pa.) 233, 239; s. c. 38 W. N. C. (Pa.) 567.

² Carey-Halliday Lumber Co. v.

Cain, 70 Miss. 628; s. c. 13 South. Rep. 239.

³ B. S. Green Co. v. Blodgett, 159 Ill. 169; s. c. 42 N. E. Rep. 176.

⁴ Holm v. Claus Lipsius Brewing Co., 21 App. Div. (N. Y.) 204; s. c. 47 N. Y. Supp. 518.

⁵ Omaha Consol. Vinegar Co. v. Burns, 49 Neb. 229; s. c. 68 N. W. Rep. 492.

⁶ 4 Thomp. Corp., § 5069.

by holding that a deed executed in the name of the corporation by J. W. Wilson, its president, with the word "seal" at the end of his signature, was not the deed of the corporation, but of the individual.⁷

§ 8421. **Presumption in the Case of the Formal Execution of a Sealed Instrument.**— A contract signed by the president and secretary of a corporation, bearing the corporate seal and delivered to the obligee named therein, is *prima facie* the act of the corporation.⁸

§ 8422. **When Stranger May Presume that Formalities Have Been Complied with.**— Where the power to make a given contract exists in a corporation, a person entering into the contract with it need not inquire whether all the antecedent formalities by the corporation have been complied with, if the contract is regular on its face and under the corporate seal;⁹ and the same is no doubt true where contracts of corporations which are not required to be under seal, are formally made and signed by the corporation by the proper officers, although the corporate seal is not used. Irregularities in

⁷ Caldwell v. Morganton Man. Co., 121 N. C. 339; s. c. 28 S. E. Rep. 475; citing Clayton v. Cagle, 97 N. C. 300. As to another deed which does not appear to have been sealed at all, but which was signed by the president of the corporation, which purported to be the grantor, and by two members of it, the court held that it was not a good deed either at common law or under the same statute: Caldwell v. Morganton Man. Co., 121 N. C. 339; s. c. 28 S. E. Rep. 475. Among many modern cases on the necessity of the use of the corporate seal, are: Leinkauff v. Calman, 110 N. Y. 50; Fitch v. Lewiston Steam Mill Co., 80 Me. 34; Muscatine Water Works Co. v. Muscatine Lumber Co., 85 Iowa, 112; Curtis v. Piedmont Lumber & Min. Co., 109 N. C. 401; Carey-Halliday Lumber Co. v. Cain, 70 Miss. 628. Decisions as to the use of a *scroll* or other substitute for the corporate seal: Bank of Middlebury v. Rutland & C. R. Co., 30 Vt. 159; Mill Dam Foundery v. Hovey, 21 Pick. (Mass.) 417; Tenney v. East Warren Lumber Co., 43 N. H. 343; Gashwiler v. Willis, 33 Cal. 11; s. c. 91 Am. Dec. 607; Ran-

som v. Stonington Sav. Bank, 13 N. J. Eq. 212.

⁸ Andres v. Fry, 113 Cal. 124; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 611; 45 Pac. Rep. 534; Sioux City Terminal & C. Co. v. Trust Co., 82 Fed. Rep. 124, 137; s. c. 49 U. S. App. 523; 27 C. C. A. 73; Burrill v. Nahant Bank, 2 Met. (Mass.) 163; s. c. 35 Am. Dec. 395; Canandarque Academy v. McKechnie, 90 N. Y. 618; Wood v. Whelen, 93 Ill. 153; Southern California Colony Asso. v. Bustamente, 52 Cal. 192; Blood v. La Serena Land & C. Co., 113 Cal. 221; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 451; 45 Pac. Rep. 252; rev'g in Banc, 41 Pac. Rep. 1017. The conclusion of the court in this last case, that this presumption is overcome by evidence that there was no authorization except by the stockholders of the corporation executing the mortgage, prior to its organization, which consequently did not bind it although it received the fruits of the mortgage, is the conclusion of a divided court, and is grossly untenable and unjust.

⁹ Sheppard v. Bonanza Nickel Min. Co., (Ch.) 25 Ont. Rep. 305.

the meeting of a corporation at which a mortgage is executed do not affect the mortgagee dealing in good faith with the company, but such mortgagee has the right to assume that the provisions of the by-laws have been complied with.¹⁰ One who takes a mortgage from a corporation to secure an *existing debt* is entitled to rely on the same presumption of regularity that obtains in other cases, where, by making the mortgage, the corporation obtains an *extension* for two years.¹¹

§ 8423. **Variance Between the Authorizing Instrument and the Contract as Made.**— The fact that some of the provisions of a mortgage executed by the president and secretary of a corporation are not identical with the resolution of the board of directors authorizing its execution will not invalidate the mortgage, where the company delivered it to the trustee, signed by its president and secretary and sealed with its corporate seal, and sold the bonds issued under it and received the proceeds.¹² So, it has been held that the fact that a resolution by the trustees of a corporation, authorizing the execution of a mortgage by the corporation, did not prescribe the conditions to be inserted, or especially mention or authorize conditions as to keeping the property insured and authorizing the mortgagee to take possession and foreclose the mortgage,— will not render the mortgage void because of the insertion of such conditions therein.¹³ A mortgage of a corporation is not invalid as to special provisions declaring the whole debt due for default in interest, because the records of the meeting of the directors at which it was executed do not show such provisions, where the draft of the mortgage was present at the meeting and its provisions were discussed.¹⁴

§ 8424. **When Formal Resolution of Directors Dispensed with.**— The contract which a corporation has the power to make in the ordinary prosecution of its business cannot be invalidated by showing that there was no formal resolution of the directors authorizing it, if it appear that a majority of the trustees consulted together

¹⁰ Ashley Wire Co. v. Illinois Steel Trust Co., 82 Fed. Rep. 124; s. c. 49 Co., 164 Ill. 149; s. c. 45 N. E. Rep. U. S. App. 523; 27 C. C. A. 73.

¹¹ Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149; s. c. 45 N. E. Rep. Wash. 566; s. c. 35 Pac. Rep. 396.

¹² Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149; s. c. 45 N. E. Rep. 410.

¹³ Vincent v. Snoqualmie Mill Co., 7

¹⁴ Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149; s. c. 45 N. E. Rep. 410.

¹⁵ Sioux City Terminal &c. Co. v.

about it prior to its execution and consented to its execution.¹⁵ Formal corporate action, such as a resolution of the board of directors, is often dispensed with, even in respect of the most important acts, when done by the executive officer of the corporation with the *knowledge and acquiescence* of the directors and stockholders; and this often happens in those trading corporations where there are few stockholders, or where all the stockholders are directors. For example, the fact that a *sale* of the *entire stock* of goods of a trading corporation was not authorized at a regular directors' meeting does not render it invalid, where it was made by the *president* as such, with the knowledge of all the directors and stockholders.¹⁶

§ 8425. Formalities in the Execution of Written Instruments.—

An *assignment* of a claim held by a corporation is *prima facie* valid where it is signed by the president and secretary, and has the seal of the corporation attached.¹⁷ The *seal* of a publishing company which publishes in its newspaper a *delinquent tax list* need not be affixed to the *certificate of publication* made by its president, under a statute¹⁸ requiring the publisher's certificate under oath, as the act is an individual and not a corporate act.¹⁹

§ 8426. Invalidity of Promissory Notes Executed by a Part Only of the Joint Authorized Agents.—

Where several agents are appointed to act jointly, all must join, unless the appointing instrument or governing statute, or custom of the corporation, permits a majority to act.²⁰ Hence, the unauthorized act of two of three trustees of a corporation in executing a promissory note without the knowledge or consent of the third, for the individual benefit of one of the trustees signing it, does not bind the third trustee, or the stockholders, unless he, with full knowledge and opportunity to act, subsequently ratifies their action.²¹

§ 8427. Contracts Signed by Agent in His Own Name and Without Disclosing Agency.—

A contract may be signed by the agent of a

¹⁵ Wheeler &c. Co. v. Everett Land Co., 14 Wash. 630; s. c. 45 Pac. Rep. 316.

¹⁶ Jordan v. Collins, 107 Ala. 572; s. c. 18 South. Rep. 137.

¹⁷ State v. Heckart, 62 Mo. App. 427.

¹⁸ Illinois Revenue Act, § 186.

¹⁹ Hertig v. People, 159 Ill. 237; s. c. 42 N. E. Rep. 879; Bass v. People, 159 Ill. 283; s. c. 42 N. E. Rep. 882.

²⁰ 3 Thomp. Corp., § 3910.

²¹ Edwards v. Carson Water Co., 21 Nev. 469; s. c. 34 Pac. Rep. 381.

corporation, or by a person holding a majority of its shares, in his own name, and not disclosing any agency to make it for the corporation, and yet it may be shown, by extrinsic evidence, by circumstances, by what was done under it, that it was intended to bind the corporation, and specific performance of it may be compelled as a contract of the corporation.²² Thus, a note not in the corporate name and not disclosing any agency from the corporation to make it, is *prima facie* not the note of the corporation, but this presumption may be rebutted by evidence *aliunde*.²³ A note, the execution of which was authorized by a corporation for the purpose of paying another note due by it, and used for that purpose, but which was made by its officers, through mistake and inadvertence, without signing the name of the corporation thereto, and was taken up when due by certain of the signers,— is a proper claim against its assignee in insolvency.²⁴

§ 8428. **Contract Signed with Individual Name and Official Addition Deemed the Contract of the Corporation.**— Recurring to a subject fertile in trouble and in litigation, mistakes made by plain men in executing contracts intended by both parties to be contracts of corporations for which the signers act, and their subsequent discovery through being enlightened by judicial decisions, that they had done what neither party to the engagement intended, had bound themselves personally,— we find a growing tendency on the part of the courts to construe contracts, so informally executed, in accordance with common sense, common experience and common justice, by making them contracts of the corporation if that was the real intention. Accordingly, where the *vice-president* of a corporation signed a contract with his own proper name, adding the words “Prest. Metropole Building & Turkish Bath Co.,” this was held to be the contract of the corporation.²⁵ So, it has been held

Compare *Morris v. Griffiths & Co.*, 69 Fed. Rep. 131; s. c. 1 Ohio Dec. Fed. 170; 34 Ohio L. J. 191. In Pennsylvania, the execution and delivery of a *judgment note*, in order to constitute a valid obligation of a corporation, must be *authorized* either by the *directors* or *stockholders*: *Atlantic Ref. Co. v. Mengel*, 6 Pa. Dist. Rep. 223.

²² *Jones v. Williams*, 139 Mo. 1; s. c. 37 L. R. A. 682; 40 S. W. Rep. 353; 39 S. W. Rep. 486; 61 Am. St. Rep.

436; 6 Am. & Eng. Corp. Cas. (N. S.) 734.

²³ *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158; s. c. 51 Am. Dec. 59, and note. Compare *McCroskey v. Ladd*, (Cal.) 23 Pac. Rep. 216,— a case which does not seem to be officially reported.

²⁴ *Re Pendleton Hardware & Co.*, 24 Or. 330; s. c. 33 Pac. Rep. 544.

²⁵ *Metropole Building & Co. v. Garden City Fan Co.*, 50 Ill. App. 681.

that a corporation is liable upon a note reading "Sixty days after date we promise to pay," made by its manager in payment for goods purchased by him as such, and signed in his name with the addition of the word "manager," followed by the name of the corporation, where both the manager and the payees of the note intended to make the company liable, and the manager had authority to make corporate notes.²⁶

²⁶ Fairchild v. Ferguson, 21 Can. S. C. 484.

CHAPTER CCXVI.

CURING INFORMAL OR UNAUTHORIZED CONTRACTS BY RATIFICATION, ADOPTION, RECOGNITION, WAIVER, ESTOPPEL.

SECTION	SECTION
8430. General doctrine as to ratification by corporations.	benefits of an unauthorized or informal contract.
8431. Ratifications bind privies.	8439. Knowledge necessary to a valid ratification.
8432. Ratifications do not affect intervening rights of third persons.	8440. Failing to disaffirm within a reasonable time after knowledge.
8433. Ratification by recognition and adoption.	8441. What acts amount to ratifications in particular cases.
8434. Contracts informally executed cured by ratification.	8442. What acts do not amount to ratifications.
8435. Oral proof of recognition of contracts required by statutes to be in writing.	8443. Ratification of contracts between corporations having common directors.
8436. Ratification by the board of directors.	8444. Ratification of the engagements of promoters.
8437. Ratification by the stockholders.	
8438. Ratification by accepting the	

§ 8430. General Doctrine as to Ratification by Corporations.—

Generally speaking, a corporation can ratify an unauthorized contract, which its agent or an officious third person has assumed to make in its behalf, where an individual can. But this must be understood only with reference to those contracts which the corporation has, under its charter or governing statute, the power to make, or which, being *ultra vires*, it can become estopped from repudiating, on principles elsewhere considered.¹ If the contract is *ultra vires* in the sense of being *malum in se*, immoral, opposed to a sound public policy, or against the provisions of the statute law enacted to safeguard the rights of the public,—then it may be conceded that it cannot be affirmed or ratified; since any attempt at ratification is an attempt to repeat the offense against the public.² But if it is merely *ultra vires* in the sense of having been made by

¹ *Ante*, § 8321, *et seq.*

² *California Bank v. Kennedy*, 167

U. S. 362; s. c. 42 L. ed. 198; 14 Bkg.

L. J. 375; 17 Sup. Ct. Rep. 831.

an officer or agent of the corporation not thereto duly authorized by its governing body, or in the sense of being in excess of its granted powers, without being immoral or opposed to a sound public policy or to some statute enacted to conserve the rights of the public, but merely injurious to its stockholders, then it is capable of ratification, and circumstances may arise under which the corporation or its stockholders will be estopped from repudiating it. Subject to this qualification, a corporation may ratify an unauthorized act of its directors or any of them, or of any of its officers or agents, or of any person assuming to act for it, the same as an individual can.³ Nor is it at all necessary in order to a valid ratification that there should be some formal corporate action. As more fully shown hereafter,⁴ it is not always necessary that either the board of directors, as such, or the stockholders specially convened, shall expressly act upon the subject-matter needing ratification.⁵ Finally, as in the case of a ratification by an individual, so a ratification by a corporation *reaches back* to the date of the unauthorized act which is confirmed, and is equivalent to a precedent authority.⁶

§ 8431. **Ratifications Bind Privies.**—Ratifications, like estoppels, bind privies. Thus, an *assignee* of an insolvent corporation, which has ratified an unauthorized mortgage by its president, is equally concluded thereby with the corporation, where there is no suggestion of fraud, and the creditors whom he represents are not subsequent purchasers in good faith for a valuable consideration, and have no lien upon the property.⁷

§ 8432. **Ratifications do not Affect Intervening Rights of Third Persons.**⁸—Where the president of a corporation makes an unauthorized assignment of its property for the *benefit of its creditors*, a subsequent ratification of it by the board of directors will not be allowed to have the effect of validating the conveyance as against creditors who levy attachments upon the property between the assignment and t¹ ratification.⁹ A mortgage purporting to be

³ *People v. Eel River &c. R. Co.*, 98 Cal. 665; s. c. 33 Pac. Rep. 728; *Webster v. Widmayer* (Pa. C. P.), 4 Lack. L. News, 1.

⁴ *Post*, § 8438.

⁵ *Greer v. Sellers*, 64 Ill. App. 505.

⁶ *Boggs v. Lakeport Agri. Park Asso.*, 111 Cal. 354; s. c. 3 Am. &

Eng. Corp. Cas. (N. S.) 387; 43 Pac. Rep. 1106.

⁷ *Gribble v. Columbus Brew. Co.*, 100 Cal. 67; s. c. 34 Pac. Rep. 527.

⁸ 4 Thomp. Corp., § 5305.

⁹ *Norton v. Alabama Nat. Bank*, 102 Ala. 420; s. c. 14 South. Rep. 872.

that of a corporation, not authorized by the board of directors nor bearing the corporate seal, cannot, by subsequent ratification by the stockholders and directors and the affixing of the seal, be made to operate to create a superior lien as against the mechanic's lien of a creditor whose rights accrue before such ratification.¹⁰

§ 8433. **Ratification by Recognition and Adoption.**— Without attempting to codify all the reasoning of the judges, it may be said that the acts and engagements made by the officers and agents of a corporation in its behalf under such circumstances that the corporation might disaffirm them, become valid by the subsequent recognition and adoption of whatever official body of the corporation had power to authorize the act in the first instance,—in general, the board of directors or trustees.¹¹ Thus, bonds of a corporation informally executed, but recognized as valid at numerous meetings of the trustees, become, if they were not so at first, its valid obligations.¹² Such recognition in one case may afford *evidence* of an authority in the particular officer to do a similar act in another like case. Thus, an investment association which permits its vice-president to solicit one to purchase its bonds, and recognizes a monthly payment by him to such vice-president as properly made, and gives him proper credit and receipts therefor, cannot repudiate payments made in the same manner for a subsequent month.¹³ So, a notice by the president of a corporation to its tenant, of the termination of the lease, under a provision therein, is sufficiently shown to be authorized by the adoption by the corporation of such notice, for the purposes of summary proceedings to recover possession of the premises.¹⁴

§ 8434. **Contracts Informally Executed Cured by Ratification.**— A corporation whose internal regulations require its contracts to be executed in a certain manner may, by acquiescence, become liable upon contracts made by its agent in some other manner.¹⁵

¹⁰ National Foundry &c. Works v. Oconto Water Co., 68 Fed. Rep. 1006.

¹¹ Cooper v. Potts, 185 Pa. St. 115; 39 Atl. Rep. 824.

¹² Seymour v. Spring Forest Cemetery Asso., 144 N. Y. 333; aff'g s. c. 45 N. Y. St. Rep. 520; s. c. 19 N. Y. Supp. 94.

¹³ Union Invest. Asso. v. Geer, 64 Ill. App. 648; s. c. 1 Chic. L. J. Wkly. 549.

¹⁴ Manhattan Life Ins. Co. v. Gosford, 3 Misc. (N. Y.) 509; s. c. 52 N. Y. St. Rep. 419; 23 N. Y. Supp. 7.

¹⁵ Illinois Trust &c. Bank v. Pacific R. Co., 117 Cal. 332; s. c. 49 Pac. Rep. 197.

§ 8435. **Oral Proof of Recognition of Contracts Required by Statutes to be in Writing.**—There is more difficulty in applying this principle so as to validate the oral engagements of the officers and agents of a corporation made in its behalf, where there is a statute requiring the contracts of corporations to be in writing. Such a statute is founded in the same public policy which dictated the Statute of Frauds and Perjuries. It may fairly be conceded that where there is such a statute—let us say a statute requiring corporate contracts involving a corporate liability exceeding \$100, to be in writing and under the corporate seal, or signed by some officer authorized thereto,—so long as a parol engagement subject to the interdiction of the statute remains *executory*, and there are no circumstances of *fraud* or of *estoppel*, such a contract cannot be made binding upon the corporation by parol evidence of a recognition of it by an officer of the corporation having authority to make it in the first instance. Such a view would nullify the statute. The recognition or ratification must be by an instrument of equal dignity and evidentiary value as the instrument which the statute requires for the original contract. A recognition, to be valid, must be made in writing and must afford evidence of the nature, purpose and substance of the contract.¹⁶ But no proper system of remedial justice would allow a corporation, even under such a statute, to keep the fruits of a parol contract and then repudiate the contract on this ground.¹⁷

§ 8436. **Ratification by the Board of Directors.**—Any contract relating to the business of the corporation, such as its directors or trustees might have authorized in the first instance,—as distinguished from *constituent* acts, or acts which by reason of statutes require the assent of the stockholders,—may be ratified by the directors when made without precedent authority or without due formality, so as to be voidable; and such a ratification has the effect of a precedent authorization or of a precedent contract made with due formality.¹⁸ Such a ratification need not be evidenced by a formal resolution of the board, but may be shown by their express

¹⁶ Curtis v. Piedmont Lumber &c. York &c. Invest. Co., 45 N. Y. St. Co., 109 N. C. 401; s. c. 13 S. E. Rep. Rep. 645; s. c. 18 N. Y. Supp. 454; 944. aff'g 41 N. Y. St. Rep. 90; s. c. 16 N. Y. Supp. 210; Nebraska &c. Loan Co. v. Bell, 58 Fed. Rep. 326; s. c. 7 C. C. A. 253.

¹⁷ Curtis v. Piedmont Lumber &c. Co., *supra*.

¹⁸ First Nat. Bank v. Sioux City &c. Co., 69 Fed. Rep. 441; Schurr v. New

promise to perform it, however evidenced,¹⁹ by acquiescence after acquiring knowledge of the engagement,²⁰ and by suffering the corporation to retain the fruits of it. For example, the board of directors of a corporation, authorized by its by-laws to borrow money and execute any manner of security for the payment of the same, may ratify and adopt the act of the secretary in executing a note in the name of the company for borrowed money without authority; and when so ratified such note will bind the company as fully as if its execution were authorized in advance.²¹

§ 8437. **Ratification by the Stockholders.**—The stockholders of a business corporation are its ultimate constituency; they are in substance its proprietors, its partners acting through an agency created by themselves; it is for their profit that the business of the corporation is carried on. They therefore have the power of ratifying any contract entered into in the name and behalf of the corporation which is *ultra vires merely as against them*; any contract which they have the right to disaffirm; any contract which they have the right to invoke the aid of a court to enjoin or annul; saving always those contracts which are *ultra vires* as against the State.²² They may not, even by unanimous consent, legalize or vitalize a void illegal contract by which the corporation attempts to transfer all its property to another company in consideration of shares in the latter.²³ But they may ratify a contract by the directors, selling and conveying all the property of the corporation without their consent;²⁴ or the creation by the directors of an indebtedness without their authority;²⁵ and where, under their charter, by-laws, or other governing instrument, a stated majority could authorize, the same

¹⁹ 4 Thomp. Corp., § 5298, *et seq.*

²⁰ *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277; s. c. 13 L. R. A. 559; 28 N. E. Rep. 245 (acquiescence after knowledge in the acts of a committee); *Union Pac. R. Co. v. Chicago & c. R. Co.*, 163 U. S. 564; s. c. 41 L. ed. 265; 16 Sup. Ct. Rep. 1173.

²¹ *Nebraska & c. Loan Co. v. Bell*, 58 Fed. Rep. 326; s. c. 7 C. C. A. 253. So, the making of an agreement by the officers of a corporation, with the knowledge and assent of all the directors manifested at a meeting *in advance* of the transaction, is equivalent to ratification thereof by the board within the meaning of a provision in

the certificate of incorporation, that a contract not under the corporate seal shall not be binding, "unless duly ratified by its board of directors." *New York & c. Gas Light Co. v. Metropolitan Invest. Co.*, 10 App. Div. (N. Y.) 342; s. c. 41 N. Y. Supp. 797.

²² *Ante*, § 8320.

²³ *McCutcheon v. Merz Capsule Co.*, 71 Fed. Rep. 787; s. c. 31 L. R. A. 415; 3 Am. & Eng. Corp. Cas. (N. S.) 446; 37 U. S. App. 586.

²⁴ *Stokes v. Detrick*, 75 Md. 256; s. c. 23 Atl. Rep. 846.

²⁵ *Underhill v. Santa Barbara Land & c. Co.*, 93 Cal. 300; s. c. 28 Pac. Rep. 1049.

majority may ratify;²⁶ but where the act is of such a nature that it cannot be done as against a dissenting stockholder, then it can only be ratified by unanimous consent.²⁷ On the other hand, if a majority could have authorized a given contract in the first instance, unanimous consent is not necessary to its ratification.²⁸ Unauthorized contracts made by the officers of a corporation, but capable of ratification, are often made valid by being ratified and affirmed by the stockholders at general meetings.²⁹ Thus, under English company law, the issue of preferred shares by an investment company, without the special resolution required by its memorandum of association, is ratified by resolutions of meetings of shareholders unanimously adopting the terms under which such shares were issued.³⁰ It seems scarcely necessary to add that the stockholders who alone can ratify an unauthorized contract made by the directors must be *real* and not *sham* stockholders.³¹ As in the case of a ratification by the governing body of the corporation,³² the stockholders are entitled to a reasonable time, after coming to a knowledge of the unauthorized transaction, within which to affirm or disaffirm it; and this time may be longer than where it is the office of the directors, or of a managing officer to affirm or disaffirm; since the stockholders often form a numerous body, meeting only at distinct intervals, and manifestly they ought to be allowed time to meet and consult.³³ Finally, as in case of a

²⁶ Thus, a contract within the powers of a corporation, signed and attested by the proper officers, and approved by the executive committee, vested *ad interim* with all the powers of the board, under authority of a delegation of such powers from the directors, to make which they were empowered by by-laws authorized by the charter, and approved by two-thirds of all the stockholders, being all present at a regular meeting,—is binding on the corporation: *Chicago &c. R. Co. v. Union P. R. Co.*, 47 Fed. Rep. 15; s. c. 10 Ry. & Corp. L. J. 283; 47 Am. & Eng. R. Cas. 340; s. c. aff'd in 51 Fed. Rep. 309; s. c. finally aff'd in 163 U. S. 564.

²⁷ *Chicago Hansom Cab Co. v. Yerkes*, 141 Ill. 320; s. c. 11 Ry. & Corp. L. J. 265; 30 N. E. Rep. 667.

²⁸ *San Diego &c. R. Co. v. Pacific Beach Co.*, 112 Cal. 53; s. c. 33 L. R. A. 788; 3 Am. & Eng. Corp. Cas. (N. S.) 580; 44 Pac. Rep. 333.

²⁹ *Bates v. Coronado Beach Co.*, 109 Cal. 160; s. c. 41 Pac. Rep. 855; *Citizens' Gas Light Co. v. Wakefield*, 161 Mass. 432; s. c. 37 N. E. Rep. 444.

³⁰ *Re London &c. Invest. Corp.*, [1895] 2 Ch. 860; s. c. 64 L. J. Ch. (N. S.) 729; 73 Law T. Rep. 280.

³¹ Persons assuming to be stockholders of a bank, who have not paid for their stock and "dedicated" the sum paid to the business, as required by the Illinois Banking Act, § 5, but having instead produced a sum temporarily to be counted by the auditor in order to procure a certificate of a company organization, which sum is immediately withdrawn, are not *bona fide* stockholders, and cannot ratify previous unauthorized acts of the directors: *McNulta v. Corn Belt Bank*, 164 Ill. 427; s. c. 45 N. E. Rep. 954; aff'g s. c. 63 Ill. App. 593.

³² *Post*, § 8440.

³³ Where the stockholders did not learn of a voidable contract made by

ratification by the directors, or by an officer having power to ratify, a ratification by the stockholders is equivalent to a precedent authority.³⁴

§ 8438. **Ratification by Accepting the Benefits of an Unauthorized or Informal Contract.**—A corporation, by accepting with knowledge the benefit of an unauthorized or informal contract made by persons professing to act for it, ratifies it and estops itself from repudiating it.³⁵ Another way of stating this principle is to say that when an unauthorized or informal contract has been *executed on the other side*, and the corporation has received the fruits of its execution from the other party, it thereby becomes estopped to repudiate the obligation of it so far as it is concerned.³⁶ And, as elsewhere shown, this principle extends so far as to validate *ultra vires* contracts, that is, contracts which, in strictness, are beyond the power of the corporation itself, provided they be not contracts in their nature immoral, opposed to a sound public policy, or to the positive statute law.³⁷ Illustrations of the principle might be greatly multiplied, but they would hardly serve to make it plainer. Take the frequent case of the unauthorized execution, by the officer

the directors until their first meeting thereafter, and at the first annual meeting thereafter directors were chosen who promptly repudiated the contract, it was held that there had been no ratification: *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131; s. c. 11 Rail. & Corp. L. J. 169; 23 Atl. Rep. 708.

³⁴ *Underhill v. Santa Barbara Land &c. Co.*, 93 Cal. 300; s. c. 28 Pac. Rep. 1049. What does not amount to a ratification by the stockholders: *Charter Gas Engine Co. v. Charter*, 47 Ill. App. 36.

³⁵ *Hubbard v. Haley*, 96 Wis. 578; s. c. 71 N. W. Rep. 1036; *Clement &c. Co. v. Michigan Clothing Co.*, 110 Mich. 458; s. c. 68 N. W. Rep. 224; 3 Det. L. N. 422; *V. Loewers Gambinus Brew. Co. v. Friedman*, 21 Misc. (N. Y.) 32; s. c. 46 N. Y. Supp. 867; *Frank v. Hicks*, 4 Wyo. 502; s. c. 35 Pac. Rep. 475; rehearing denied in 35 Pac. Rep. 1025; *Thomas v. City Nat. Bank*, 40 Neb. 501; s. c. 24 L. R. A. 263; 58 N. W. Rep. 943; *West Salem Land Co. v. Montgomery Land Co.*, 89 Va. 192; s. c. 15 S. E. Rep.

524; *Hetfield v. Addicks*, 154 Pa. St. 1; s. c. 32 W. N. C. 162; 26 Atl. Rep. 215; *Willis v. St. Paul Sanitation Co.*, 53 Minn. 320; s. c. 55 N. W. Rep. 550; *Smith v. Martin Anti-Fire Car Heater Co.*, 47 N. Y. St. Rep. 26; s. c. 19 N. Y. Supp. 285; 12 Ry. & Corp. L. J. 55; *Hitchcock v. Barrett*, 50 Fed. Rep. 653; *Jenet v. Albers*, 7 Colo. App. 271; s. c. 43 Pac. Rep. 452.

³⁶ *Hubbard v. Haley*, 96 Wis. 578; s. c. 71 N. W. Rep. 1036; *Cunningham v. Massena Springs &c. R. Co.*, 63 Hun (N. Y.) 439; s. c. 44 N. Y. St. Rep. 723; 18 N. Y. Supp. 600.

³⁷ Thus, a corporation is held to have adopted the acts of its agents in conducting a business *ultra vires*, where its managing officers, knowing that the business has been done and that the income of the business has been received and the expenses of it paid by the treasurer, have adopted the action of the treasurer and elected to keep the money: *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177; s. c. 22 L. R. A. 364; 44 Am. & Eng. Corp. Cas. 357; 35 N. E. Rep. 776.

of a corporation, of a mortgage of its property. While it might have been repudiated by the corporation at the outset, yet if the money thereby procured was received and used by the corporation with the knowledge of its governing body, it will be deemed to have been ratified, and the corporation or its privies will be estopped from repudiating it.³⁸ Or, take the case of an invalid appointment of an agent for a corporation. Here, although the act might have been repudiated at the outset, yet it is ratified and affirmed if the corporation, with knowledge, avails itself of his services.³⁹ So, if a corporation, authorized to deal in real estate, takes no steps to repudiate the act of its agent in *purchasing land* and giving a *mortgage* for the purchase price, although notified of the transaction within a week, but enters into possession of the land and deals with it as its own, receiving the rents and profits, it becomes bound by the act of such agent.⁴⁰ The acts of *de facto* directors or officers are valid without any ratification, if, under the same circumstances, the corporation would have been bound by the act if done by directors or officers who were such *de jure*; but if a ratification were needed, then it may be said that it takes place when the corporation receives and retains the benefits with knowledge.⁴¹ An analogous doctrine that an acceptance by a corporation, with knowledge of the fruits of a contract which one has assumed to make for it, is *one of the modes of proving a previous authorization*. Thus, it has been held that the authority of the *president* of a bank to *pledge its deposit* with another bank as security for loans, is sufficiently shown by proof that the board of directors left it to the president, as their agent and the agent of the bank, to negotiate loans and make such contracts as to repayment and security as were lawful and usual, and that the

³⁸ Edelhoff v. Horner-Miller Strawgoods Man. Co., 86 Md. 595; s. c. 39 Atl. Rep. 314; 7 Am. & Eng. Corp. Cas. (N. S.) 721; Pittsburgh & C. R. Co. v. Keokuk & C. R. Co., 131 U. S. 371; s. c. 33 L. ed. 157; Gribble v. Columbus Brew. Co., 100 Cal. 67; s. c. 34 Pac. Rep. 527.

³⁹ Nelson v. Kansas City & C. R. Co., 66 Mo. App. 647; s. c. 2 Mo. App. Rep. 385.

⁴⁰ Ryan v. Terminal City Co., 25 Nov. Sco. 131.

⁴¹ For example, contracts in the name of a fair association for material for a building upon its

property, made by persons claiming to be directors and having possession of its books and control of its property, were held to be binding upon the corporation, although the person selling such material had notice, before the furnishing of any items of the bill, that there was a litigation pending to determine the right of such persons to act as directors, where the materials were retained as the property of the corporation after they were ousted: Richards v. Farmers & C. Institute, 154 Pa. St. 449; s. c. 26 Atl. Rep. 210.

bank had received the benefit of the contract, without objection, for more than a year.⁴²

§ 8439. **Knowledge Necessary to a Valid Ratification.**—In the absence of *laches*, or of that *negligent ignorance* which in law is tantamount to actual knowledge, the general rule is that, in order to a valid ratification of an unauthorized contract, by accepting the fruits of it or otherwise, the governing body of the corporation, or the stockholders seeking to set it aside must have *known* of the circumstances making it invalid.⁴³ Thus, the unauthorized contract by the president of a railroad corporation in behalf of the company, to indemnify a subcontractor for the construction of the road, against loss, in consideration of his continuing the work after a breach of his contract on the part of the principal contractor, is not ratified by the acceptance of the constructed road by the company, *in ignorance* of the contract and under the belief that the work of construction was prosecuted under the contract.⁴⁴ But this principle can have no application where, from the attending circumstances, the officer of the corporation capable of receiving *notice* for it, or its governing body, or its stockholders, are, in good faith towards the other party to the contract, *under the duty of knowing* of its existence and of affirming or disaffirming it within a reasonable time; and this introduces a variety of exceptions to this rule. Moreover, in applying this principle, it is to be constantly kept in mind—and it is a rule essential to the rights of third persons,—that, the directors of the corporation being under the *duty* of knowing the facts, are *presumed* to have had knowledge of them, unless reasons exist excluding this presumption.⁴⁵

§ 8440. **Failing to Disaffirm within a Reasonable Time After Knowledge.**—If a corporation, after acquiring through its governing body, or through its officer whose knowledge in law affects it

⁴² Bell v. Hanover Nat. Bank, 57 Fed. Rep. 821; s. c. 10 Bkg. L. J. 21.

⁴³ Lyndon Mill Co. v. Lyndon Literary &c. Inst., 63 Vt. 581; s. c. 22 Atl. Rep. 575; Denniston v. Home Life & Invest. Co., 162 Pa. St. 86; s. c. 24 Pitts. L. J. (N. S.) 475; 29 Atl. Rep. 275; Camacho v. Hamilton Bank Note &c. Co., 2 App. Div. (N. Y.) 369; s. c. 73 N. Y. St. Rep. 457; s. c. 37 N. Y. Supp. 725; Olney v. Baird, 7 App.

Div. (N. Y.) 95; s. c. 40 N. Y. Supp. 202; 74 N. Y. St. Rep. 765; Des Moines Man. &c. Co. v. Tilford Mill Co., 9 S. Dak. 542; s. c. 70 N. W. Rep. 839.

⁴⁴ Grant v. Duluth &c. R. Co., 66 Minn. 349; s. c. 69 N. W. Rep. 23.

⁴⁵ 4 Thomp. Corp., § 5308; Stainback v. Junk Bros. Lumber &c. Co., 98 Tenn. 306, 314; s. c. 39 S. W. Rep. 530.

with notice,⁴⁶ the knowledge of an unauthorized contract attempted to be made in its behalf, fails to disaffirm it within a reasonable time, it thereby ratifies and confirms it.⁴⁷ What will be a reasonable time within which to affirm or disaffirm will depend upon the circumstances of each case. Justice to the opposite party will, as a general rule, demand a prompt disaffirmance after knowledge; but circumstances may exist where the governing body, or officer having the power and duty of affirming or disaffirming, will be indulged in a little time to think over the matter.⁴⁸

§ 8441. What Acts Amount to Ratification in Particular Cases.—

An unauthorized release of a mortgage to a corporation is ratified where a trustee of the corporation, appointed to effect a voluntary liquidation of its affairs and authorized to do all things necessary to that end, with knowledge of the facts attending the release and of the fact that the original notes secured by the mortgage have been renewed by new notes given to stockholders individually,—takes up the renewal notes and procures a *new note* in lieu thereof and a *new mortgage* to secure the same, and brings suit on the note and mortgage.⁴⁹ A corporation ratifies a contract made by its stockholders as such, and not through its directors, by permitting *judgment by default* to go against it in an action on the contract.⁵⁰

§ 8442. What Acts Do not Amount to Ratifications.—An unauthorized employment for three years by the general manager of a corporation, of a person to render services for the corporation, is not ratified by the corporation merely because its president sees the employé rendering services, where the president has no *knowledge* of the terms of the contract.⁵¹ A note of a corporation, made by

⁴⁶ 4 Thomp. Corp., § 5131, *et seq.*; N. W. Rep. 308; Augusta, T. & G. R. Co. v. Kittel, 52 Fed. Rep. 63; s. c. 2 O. C. A. 615; Ashley Wire Co. v. Illinois Steel Co., 60 Ill. App. 179.

⁴⁷ Reed Bros. Co. v. First Nat. Bank, 46 Neb. 168; s. c. 64 N. W. Rep. 701; Hadden v. Natchaug Silk Co., 84 Fed. Rep. 80; Illinois Trust & Co., Bank v. Pacific R. Co., 117 Cal. 332; s. c. 49 Pac. Rep. 197; Gold Min. Co. v. National Bank, 96 U. S. 640; Pittsburgh & Co. R. Co. v. Keokuk & Co. Bridge Co., 131 U. S. 371; s. c. 33 L. ed. 157; Central Trust Co. v. Ashville Land Co., 72 Fed. Rep. 361; s. c. 43 U. S. App. 1; s. c. 18 C. C. A. 590; Wright v. Farmers' Mut. L. S. Ins. Asso., 96 Iowa, 360; s. c. 65

4 Thomp. Corp., § 5300.

⁴⁹ Smith v. Wells Man. Co., 148 Ind. 333, 342; s. c. 46 N. E. Rep. 1000.

⁵⁰ Nebraska Nat. Bank v. Ferguson, 49 Neb. 109; s. c. 68 N. W. Rep. 370.

Facts amounting to a ratification of a contract for the *sale of land* made by the president of a corporation in his own name: Haynie v. American Trust Invest. Co., 39 S. W. Rep. (Tenn.) 860.

⁵¹ Camacho v. Hamilton Bank Note

its vice-president without authority, is not ratified by the use of the moneys by him to pay an acceptance of the corporation upon a draft drawn for his personal benefit, nor by the deposit in its name of a portion of the moneys, where they are checked out for the individual benefit of the president and vice-president, without the knowledge of the directors.⁵²

§ 8443. **Ratification of Contracts Between Corporations Having Common Directors.**—A contract made between companies having common directors may, of course, be ratified by the constituents of the directors, the stockholders.⁵³ It seems also that contracts of this character are subject to ratification in like manner as other voidable contracts made in behalf of corporations.⁵⁴ Under the doctrine that such a contract is not void *ab initio*, but is good until disaffirmed, it is clear that there can be no disaffirmance by less than a majority of the stockholders.⁵⁵ It seems that neither the directors who made the contract⁵⁶ nor creditors⁵⁷ can disaffirm. The

&c. Co., 2 App. Div. (N. Y.) 369; s. c. 73 N. Y. St. Rep. 457; 37 N. Y. Supp. 725.

⁵² *Morris v. Griffith &c. Co.*, 69 Fed. Rep. 131; s. c. 34 Ohio L. J. 191; 1 Ohio Dec. Fed. 170. Other cases which are held not to amount to a ratification: *Haynes v. Tacoma &c. R. Co.*, 7 Wash. 211; s. c. 34 Pac. Rep. 922; *Hamilton v. Bates*, (Cal.) 35 Pac. Rep. 304; *Martin v. Santa Cruz Water Storage Co.*, (Ariz.) 36 Pac. Rep. 36 (no ratification of prior illegal vote of directors in fixing salary of secretary). That ratification by a corporation of a *purchase of its own shares* is not effected by a *renewal* of notes given for the purchase money: *Price v. Pine Mountain Iron &c. Co.*, 32 S. W. Rep. 267; s. c. 17 Ky. L. Rep. 865. Unsound decision to the effect that an unauthorized execution of a note and mortgage by the president and secretary of a corporation can be ratified only by a resolution of its board of directors which could have conferred original authority for their execution, in accordance with Cal. Civ. Code, §§ 2309, 2310, and not by exercising control over the land for the purchase price of which the note and mortgage purport to have been given: *Blood v. La Serena Land &c.*

Co., 113 Cal. 221; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 451; 45 Pac. Rep. 252; rev'g in Banc, 41 Pac. Rep. 1017.

⁵³ *San Diego &c. R. Co. v. Pacific Beach Co.*, 112 Cal. 53; s. c. 33 L. R. A. 788; 3 Am. & Eng. Corp. Cas. (N. S.) 580; 44 Pac. Rep. 333; *Grant v. United Kingdom Switchback R. Co.*, 60 L. T. (N. S.) 525; *Barr v. New York &c. R. Co.*, 125 N. Y. 263; rev'g s. c. 52 Hun (N. Y.) 555.

⁵⁴ *Metropolitan Teleph. &c. Co. v. Domestic Teleph. &c. Co.*, 44 N. J. Eq. 568; *Roberts v. Washington Nat. Bank*, 11 Wash. 550. Ratification shown by course of business between the two corporations: *United States Rolling Stock Co. v. Atlantic &c. R. Co.*, 34 Oh. St. 450; s. c. 32 Am. Rep. 380; *Kitchen v. St. Louis &c. R. Co.*, 69 Mo. 224; *Evansville Pub. Hall Co. v. Bank of Commerce*, 144 Ind. 34; s. c. 42 N. E. Rep. 1097; *Thomas v. Brownville &c. R. Co.*, 109 U. S. 522; rev'g s. c. 2 Fed. Rep. 877.

⁵⁵ *Hart v. Ogdensburg &c. R. Co.*, 89 Hun (N. Y.) 316; *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460.

⁵⁶ *Hazard v. Dillon*, 34 Fed. Rep. 485.

⁵⁷ *O'Connor Mining &c. Co. v. Coosa Furnace Co.*, 95 Ala. 614.

right to affirm may be lost by *laches*⁵⁸ or by *acquiescence*.⁵⁹ Most clearly, ratification of a contract between corporations having common directors is shown where all these elements unite: One company has entirely performed its part of the contract; the other has performed a part of it and cannot restore anything or place the other party, in whole or in part, *in statu quo*; and the stockholders of the latter company have expressly approved the contract.⁶⁰

§ 8444. **Ratification of the Engagements of Promoters.**—A corporation will be bound by an engagement entered into in its behalf by its promoters, or by persons professing to act for it before its organization, if, after it is organized and with full knowledge of the facts, it assumes the contract and agrees to pay the consideration, or accepts and retains the benefits of the contract, provided the contract is one which the corporation itself might have made in the first instance.⁶¹ This is especially so where the contract appears to be a reasonable means of carrying out some corporate power or purpose.⁶² Upon the question what will be *evidence* of such a ratification, it is to be observed that it need not be made in any express form of writing, but may be inferred from the acts or acquiescence of the corporation through its duly authorized agents. For example, in an action against a corporation to recover money loaned to its members ostensibly for it, it appeared that, upon the formal organization of the corporation and soon after the loan was made, the promoters became stockholders and officers; that the money was borrowed for the purposes of the corporation; that, after its organization, its secretary sent the plaintiff \$100, as part payment of the note by which the debt was evidenced; and that the secretary, in letters written to the plaintiff on the letter-heads of the company, stated that he hoped that they would have made money enough to pay the plaintiff's debt before it became due. It was held that this evidence was sufficient to *take to the jury the question* whether the corporation had adopted the engagement of its promoters.⁶³

⁵⁸ Hart v. Ogdensburg &c. R. Co., 475; s. c. 49 Pac. Rep. 116; rehearing denied in 50 Pac. Rep. 798. See also *supra*.

⁵⁹ O'Connor Mining &c. Co. v. Coosa Furnace Co., *supra*.

⁶⁰ San Diego &c. R. Co. v. Pacific Beach Co., 112 Cal. 53; s. c. 33 L. R. A. 788; 3 Am. & Eng. Corp. Cas. (N. S.) 580; 44 Pac. Rep. 333.

⁶¹ Schreyer v. Turner Flouring Co., 29 Or. 1; s. c. 43 Pac. Rep. 719.

⁶² Alexander v. Winters, 23 Nev.

475; s. c. 49 Pac. Rep. 116; rehearing denied in 50 Pac. Rep. 798. See also Pratt v. Oshkosh Match Co., 89 Wis. 406; Huron Printing &c. Co. v. Kittleson, 4 S. D. 520; Weatherford &c. R. Co. v. Granger, (Tex. Civ. App.) 23 S. W. Rep. 425; Colorado Land &c. Co. v. Adams, 5 Colo. App. 190; Bruner v. Brown, 139 Ind. 600.

⁶³ Schreyer v. Turner Flouring Co., 29 Or. 1; s. c. 43 Pac. Rep. 719.

TITLE TWENTY-THREE.

RECENT DECISIONS ON THE DIRECTORS
OF CORPORATIONS.

TITLE TWENTY-THREE.

RECENT DECISIONS ON THE DIRECTORS OF CORPORATIONS.

CHAPTER.

- CCXVII. Stockholders' Meetings to Elect Directors and for Other Purposes . §§ 8450-8455.
CCXVIII. Tenure of the Office of Directors . §§ 8457-8467.
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CCXXI. Obligations of Directors as Fiduciaries §§ 8493-8509.
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CHAPTER CCXVII.

STOCKHOLDERS' MEETINGS TO ELECT DIRECTORS AND FOR OTHER PURPOSES.

SECTION	SECTION
8450. Place of holding stockholders' meetings.	8453. Adjournment of meetings.
8451. Holding annual meeting at a date later than that fixed by the by-laws.	8454. Voting at such elections.
8452. Notice of stockholders' meetings.	8455. Powers exercised at meeting of stockholders when in voluntary liquidation.

§ 8450. **Place of Holding Stockholders' Meetings.**—In considering the question of the place of holding *corporate meetings*, a dis-

inction ought to be taken between stockholders' meetings assembled to elect directors or to advise with reference to constituent acts,—such as amending the charter or articles of incorporation, increasing or reducing the capital, consolidating with another corporation, going into voluntary liquidation, and the like,—and the mere business meetings of the board of directors. These will hence be treated separately. And first of *stockholders' meetings*. Regularly the stockholders of a corporation cannot meet outside the State granting the charter, for the purpose of electing directors or performing constituent acts.¹

§ 8451. **Holding Annual Meeting at a Date Later than that Fixed by the By-Laws.**—The fact that the annual meeting is not held at the time fixed by the by-laws does not preclude the holding of it at a later date. It is said to be the right and duty of the stockholders to maintain the corporate organization; and that if the right is not exercised at the precise time specified in the by-laws for its exercise, the power to hold the meeting is not exhausted, but the omission may be supplied, and an election,—duly warned of course,—may be held at a later date.²

§ 8452. **Notice of Stockholders' Meetings.**—As in the case of directors' meetings,³ so in case of stockholders' meetings, the provisions of the governing statute cannot be set aside by the by-laws, but where they conflict the latter must yield. For example, the necessity of giving a written or printed notice of the annual election of officers of a corporation to each stockholder personally, or of sending it to him through the post-office, at least fifteen days before the day of election, as required by statute, is not dispensed with by a by-law of the corporation naming a day upon which the election shall be held “at such place and hour as shall be determined” by the president and secretary, and providing for two weeks' notice by publication in a newspaper.⁴ As in the case of directors' meetings,⁵ where any unusual or extra business is to be transacted, it is sometimes necessary to state that fact, even in the case of annual meetings. Thus, where the charter of a corporation required that

¹ Duke v. Taylor, 37 Fla. 64; s. c. 31 L. R. A. 484; 3 Am. & Eng. Corp. Cas. (N. S.) 261; 19 South. Rep. 172.

² Scanlan v. Snow, 22 Wash. L. Rep. 62.

³ Post, § 8486.

⁴ Charter Gas Engine Co. v. Charter, 47 Ill. App. 36, 53.

⁵ Post, § 8487.

two weeks' notice should be given of an annual meeting in January for the election of directors, and provided that any *by-law* might be made by the general meeting of the corporation "convened in pursuance of public notice, given as in cases of election for directors," it was held that the assembled stockholders could not legally make a by-law at the meeting in January, where no notice of an intention to make any by-law was given, although a *custom* existed of performing other business at such meeting than the election of directors.⁶ But, as in case of meetings of directors, the necessity of giving formal notice of the meeting is *waived*, where all assemble and, without objection, act. Thus, where the governing statute provides that a corporation shall not mortgage its property except in pursuance of an order passed at a stockholders' meeting convened by publication of notice in a certain way,—a mortgage executed at a stockholders' meeting not so notified, but at which all the stockholders are present, is not void, but voidable only.⁸ The court should have held that the mortgage was not even voidable. The statute was intended for the protection of the stockholders, and its provisions were *waived* by their unanimous consent. In Maryland a provision in the charter of a corporation, that two weeks' notice shall be given of a specified annual meeting for the election of directors of the corporation,—does not make the transaction of other business at such meeting unlawful, where a *long-continued custom* exists to perform other business at such meeting.⁹

§ 8453. **Adjournment of Meetings to Elect Directors.**—One of the courts of Common Pleas of Pennsylvania has held that an election of directors of a corporation is unlawfully postponed, against the objection of stockholders, after taking one ballot. It is the duty of the stockholders to meet and elect the directors on the day fixed by the by-laws, and to ballot until the board has been filled.¹⁰ So far as this decision invalidates an *adjournment* of such a meeting provided there be no cause for it, its soundness may well be

⁶ Mutual F. Ins. Co. v. Farquhar, 86 Md. 668; s. c. 39 Atl. Rep. 527.

⁷ Post, § 8488.

⁸ Campbell v. Argenta Gold & c. Co., 51 Fed. Rep. 1.

⁹ Mutual F. Ins. Co. v. Farquhar, 86 Md. 668; s. c. 39 Atl. Rep. 527; citing Sampson v. Bowdoinham Steam

Mill Corp., 36 Me. 78; Atlantic Mut. F. Ins. Co. v. Sanders, 36 N. H. 252; State v. Conklin, 34 Wis. 21; Warner v. Mower, 11 Vt. 385.

¹⁰ Forsyth v. Brown, 2 Pa. Dist. Rep. 765; s. c. 33 W. N. C. (Pa.) 72; 13 Pa. Co. Ct. 576.

admitted. On the contrary, after an adjournment has taken place, whether by a formal vote entered of record or *de facto* merely, an election in the absence of some of the stockholders before the time of reassembling, is invalid. It was so held of an election which took place after the holders of a majority of the stock had left the place of meeting under an understanding that the organization of the meeting and the election should be delayed until the arrival of a train bearing another stockholder; and also of an election held by such majority stockholders after the arrival of such train and after the minority of the stockholders had left with the books of the company.¹¹ The president of the corporation cannot adjourn a stockholders' meeting without day, against the will of the stockholders.¹² If the president attempts to adjourn the meeting without the consent of the stockholders, and refuses to proceed or to permit the meeting to be continued in the office of the company, the stockholders have the right to adjourn without his attendance to another room and there hold their meeting.¹³

§ 8454. **Voting at Such Elections.**—The following holdings have been made by respectable courts of subordinate jurisdiction:—That votes cannot be added to the ballot for directors of a corporation after it has been counted and announced;¹⁴ that if *seven* directors are to be elected, a vote at which *four* receive a majority of all the votes cast elects such four, and that a *second ballot* should be held to fill the three vacant places;¹⁵ that a ballot cast at an election for secretary cannot be counted for either of two candidates, one of whose names is *written* and the other is *printed* thereon, neither of which is crossed out, where the president, on the day of election, directed the name of the former, who was nominated on that day, to be written on all the ballots.¹⁶ It is scarcely necessary

¹¹ State v. Smalley, 7 Ohio C. C. 400.

¹² State v. Cronan, 23 Nev. 437; s. c. 41 Pac. Rep. 41.

¹³ State v. Cronan, *supra*. Chairman not bound to adjourn stockholders' meeting, although articles of association give him the power to do so: Salisbury Gold Min. Co. v. Hathorn, [1897] (A. C.) 268; s. c. 66 L. J. P. C. (N. S.) 62; 76 Law T. Rep. 212.

¹⁴ Forsyth v. Brown, 2 Pa. Dist Rep.

765; s. c. 33 W. N. C. (Pa.) 72; 13 Pa. Co. Ct. 576.

¹⁵ Forsyth v. Brown, 2 Pa. Dist. Rep. 765; s. c. 33 W. N. C. (Pa.) 72; 13 Pa. Co. Ct. 576.

¹⁶ People v. Pangburn, 3 App. Div. (N. Y.) 456; s. c. 38 N. Y. Supp. 217; 73 N. Y. St. Rep. 711; rev'g s. c. 14 Misc. (N. Y.) 195; s. c. 70 N. Y. St. Rep. 428; 35 N. Y. Supp. 655; attempting to distinguish People v. Saxton, 22 N. Y. 309, and People v. Love, 63 Barb. (N. Y.) 535.

to add that the *reception of illegal votes* for a director who has, without them, a majority of the *legal votes*, does not invalidate his election.¹⁷

§ 8455. **Powers Exercised at Meetings of Stockholders when in Voluntary Liquidation.**—In England, a general meeting of a company in voluntary liquidation has power to elect directors and sanction the exercise by them of the power of enforcing payment of calls by a sale or forfeiture of shares.¹⁸

¹⁷ *Argus Co. v. Manning*, 138 N. Y. 557; s. c. 53 N. Y. St. Rep. 270; 48 Alb. L. J. 24; 34 N. E. Rep. 388. ¹⁸ *Re Fairbairn Engineering Co.*, (1893) 3 Ch. 450.

CHAPTER CCXVIII.

TENURE OF THE OFFICE OF DIRECTOR.

SECTION	SECTION
8457. Qualifications for the office of director.	8463. Agreement by a majority to perpetuate themselves in office.
8458. Acceptance of the office of director necessary.	8464. Amotion of director or trustee from office.
8459. Contesting the election of director.	8465. Directors holding over.
8460. Right of director to resign.	8466. Elections deemed valid until set aside in direct proceedings.
8461. Vacating the office by becoming disqualified.	8467. Validity of the acts of <i>de facto</i> directors.
8462. Filling vacancies in the board.	

§ 8457. **Qualifications for the Office of Director.**—The power to make reasonable *by-laws* for the government of a corporation is an inherent power;¹ and a grant of power to make such by-laws, rules and regulations for the management and government of the affairs of the corporation, its officers, directors and agents, as may be deemed necessary and proper, includes the power to make by-laws prescribing the reasonable qualifications of directors. This includes the power to make a by-law declaring that no person who is an *attorney in a suit against the corporation* shall be eligible as director.² A director cannot be regarded as disqualified, and his election consequently invalid, by reason of anything which he *may contemplate doing* when he gets into the office.³ Where the charter, statute, or other governing instrument prescribes, as a qualification for the office of director, that the person shall be a shareholder in the corporation, the meaning is that he shall be a *real*, and not a *sham* shareholder. If he is a *real* shareholder, it makes no difference how he acquired his shares, whether by gift or by purchase.⁴ For example, a provision

¹ Thomp. Corp., § 955.

² Cross v. West Virginia &c. R. Co., 37 W. Va. 342; s. c. 18 L. R. A. 582; 16 S. E. Rep. 587; 7 Am. R. & Corp. Rep. 244.

³ Railway Co. v. State, 49 Ohio St. 668; s. c. 29 Ohio L. J. 62; 39 Am. & Eng. Corp. Cas. 659; 32 N. E. Rep. 933.

⁴ Especially this must be so held

in the articles of incorporation, that the qualification of a managing director shall be the holding, in his own right, of corporate shares of a stated nominal value, requires that he shall be the *actual beneficial owner*, and not merely that they shall be registered in his name.⁵ Where the governing statute prescribes, as a qualification for the office of director, that the person must "*own*" a given number of shares, this, it has been held, means to own *beneficially*; and therefore one holding shares as a *trustee* merely, although the legal title is in him, is not eligible to the office.⁶ But it does not follow from this that the stock register of the corporation is to be disregarded, either in determining who are entitled to vote for directors, or who are qualified for the office. On the contrary, the primary office of the stock register is to enable the corporation to know who are its stockholders; and, as a general rule, *as to the corporation*, only those persons are to be deemed its stockholders who are registered as such on its books.⁷ Presumptively, therefore, the person in whose name the requisite

where the rights of third persons, *e. g.*, creditors of the corporation, are involved: *Burden v. Burden*, 8 App. Div. (N. Y.) 160; s. c. 40 N. Y. Supp. 499. There is a doubtful holding to the effect that the invalidity of the election of a person as trustee of a corporation is not cured by a subsequent *gift* and issue of stock to him which he retains: *Rozecrans Gold Mining Co. v. Morey*, 111 Cal. 114; s. c. 43 Pac. Rep. 585.

⁵ *Bainbridge v. Smith*, 41 Ch. D. 462; s. c. 33 Am. & Eng. Corp. Cas. 172.

⁶ *Re Elias*, 17 Misc. (N. Y.) 718; s. c. 28 Chicago Leg. News, 410; 40 N. Y. Supp. 910. That one of two co-trustees of the stock of a manufacturing corporation cannot be elected a director by the votes of the remaining stockholders, where he has *disfranchised* the stock held by them by persisting in voting for himself against the protest of his co-trustees,—see *Re Elias*, 17 Misc. (N. Y.) 718; s. c. 28 Chicago Leg. News, 410; 40 N. Y. Supp. 910. The requirement of General Corporation Law, § 16, that the directors of a corporation shall be shareholders therein, does not apply to the *first directors* of a *consolidated* corporation named in the consolidation certificate: *Camden Safe De-*

posit &c. Co. v. Burlington Carpet Co., 33 Atl. Rep. 479. That stockholders in the constituent corporation, who are obviously entitled to shares in the *consolidated* corporation, are in effect shareholders in the latter, although no *certificates* have been issued to them: *Ibid.* A board of directors organized under W. Va. Act Feb. 28, 1877, known as the "Boom Law," must be composed of stockholders, but they need not be residents of the State: *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351; s. c. 18 S. E. Rep. 620. Holders of *one share* of stock in a corporation may serve as directors, though parties to an outstanding executory contract by which they agreed at the *option* of a purchaser to sell such share at a nominal price, so long as such option has not been exercised: *Kuhn v. Woolson Spice Co.*, 13 Ohio C. O. 547. What is a sufficient holding of shares to qualify one as director,—see *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250; *State v. Smith*, 15 Or. 98; *Richards v. Attleborough Nat. Bank*, 148 Mass. 187; s. c. 1 L. R. A. 781. When holding of shares is unnecessary,—see *Wight v. Springfield &c. R. Co.*, 117 Mass. 226; s. c. 19 Am. Rep. 412; *State v. McDaniel*, 22 Ohio St. 354.

⁷ 2 Thomp. Corp., § 2387.

number of shares is registered on its books for the time before the election prescribed by the statute, by-law, or other governing instrument, is qualified to be a director; and it has been held that this qualification can only be impeached by showing that the shares were put in his name *colorably*, with the view to qualify him as director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company. And this is especially true where there is a statute, in affirmation of the rule of the common law, making the stock register *prima facie* evidence as to who are shareholders.⁸ Plainly, a person regularly elected and inducted into the office of director of a corporation is such *de facto* for the protection of the rights of third persons, so long as he is permitted by those having the right to oust him, to exercise the functions of the office; but this is not so where he does not accept the office, nor exercise its functions, nor hold himself out as being such director, and where he finally repudiates it.⁹

§ 8458. **Acceptance of the Office of Director Necessary.**—The mere fact that a man has been elected director or auditor of a corporation does not make him such. There must, in addition, be an acceptance of the office on his part, which acceptance must be formally expressed or implied from his conduct.¹⁰ Therefore, one who, although elected to the office, declines to accept it or perform its duties, need not be treated as a director. It is not necessary to notify him of directors' meetings in order to the regularity of proceedings which take place thereat.¹¹

§ 8459. **Contesting the Election of Director.**—The right of one to hold the office of director of a corporation is not impeachable for fraud, by one who concurred in his election,¹² merely because

⁸ Re Leslie, 58 N. J. L. 609; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 203; 33 Atl. Rep. 954.

⁹ Rozecrans Gold Mining Co. v. Morey, 111 Cal. 114; s. c. 43 Pac. Rep. 585. There is an unsound holding to the effect that a person elected director in violation of the governing statute cannot be a director *de facto*: Re Newcomb, 42 N. Y. St. Rep. 442; s. c. 18 N. Y. Supp. 16. But this displays no conception of what an officer *de facto* is.

¹⁰ United Growers Co. v. Eisner, 22 App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906.

¹¹ Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400; s. c. 29 Atl. Rep. 203. That one elected a director is presumed to have accepted the office,—see Halpin v. Mutual Brew. Co., 20 App. Div. (N. Y.) 583; s. c. 47 N. Y. Supp. 412.

¹² Re Leslie, 58 N. J. L. 609; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 203; 33 Atl. Rep. 954. Summary proceed-

he was made a director solely to make up the number of directors required by statute. A new election will not be ordered because the wrong person has been declared elected as a director, if no votes were rejected by the inspectors and it is apparent from their returns that the petitioner was lawfully elected; but in such case the wrongful incumbent will be ousted and the petitioner will be seated.¹³

§ 8460. **Right of Director to Resign.**— A director has the right to renounce the office at will, even by oral notice, without the assent of the corporation; nor is this right cut off by a statutory provision to the effect that directors shall continue in office until the next annual stockholders' meeting, or until their successors are appointed.¹⁴

§ 8461. **Vacating the Office by Becoming Disqualified.**— If the governing statute provides that directors shall hold, at the time of their election and throughout their term of office, at least a prescribed number of shares, a director who disposes of all his shares, thereby, *ipso facto*, divests himself of his office.¹⁵ Where the governing statute provides that the business of the corporation shall be conducted by directors who are shareholders therein, and that when any director shall cease to be a *bona fide* holder of some of the stock of the corporation, he shall cease to be a director, a director who makes an assignment of all his property for the benefit of his creditors and then leaves the State, thereby vacates the office.¹⁶

ing for relief against an illegal election under New Jersey statute: grounds of relief must appear in application or supporting affidavits: relief not granted because of disqualification of voter, when: *Re Leslie*, 58 N. J. L. 609; s. c. 33 Atl. Rep. 954; 3 Am. & Eng. Corp. Cas. (N. S.) 203. The *joinder of the corporation*, without authority, as a petitioner with two stockholders, in proceedings, under the New York General Corporation Law of 1892, § 27, to determine a disputed election of directors, does not affect the right of such stockholders to have their petition heard: *Argus Co. v. Manning*, 138 N. Y. 557; s. c. 53 N. Y. St. Rep. 270; 40 Alb. L. J. 24; 34 N. E. Rep. 388.

¹³ *Tomlin v. Farmers &c. Bank*, 52

Mo. App. 430. Remedy afforded by Cal. Civ. Code, § 315, providing for inquiry by the courts into corporate elections, upon the application of a person "aggrieved by any election by a corporate body," does not extend to the relief of one who has been appointed to fill a vacancy, but whose appointment has not been recognized by the other directors: *Wickersham v. Murphy*, 93 Cal. 41; s. c. 28 Pac. Rep. 793. Compare *Wickersham v. Brittan*, 93 Cal. 34.

¹⁴ *Fearing v. Glenn*, 73 Fed. Rep. 116; s. c. 38 U. S. App. 424.

¹⁵ *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250; s. c. 30 N. E. Rep. 644; 43 N. Y. St. Rep. 876.

¹⁶ *Wright v. First Nat. Bank of Trenton*, 52 N. J. Eq. 392;

§ 8462. **Filling Vacancies in Board.**—Statutes exist, of which the following is an example: “In case of death, removal, or resignation of the president or any of the directors, treasurer, or other officer of any such company, the remaining directors may supply the vacancy thus created until the next election.”¹⁷ This is construed to mean that the directors may make appointments which will hold until the next *annual* election, although the regular date for holding an election may actually intervene, if no election be held thereat.¹⁸

§ 8463. **Agreement by a Majority to Perpetuate Themselves in Office.**—An agreement by a majority of the directors and the owners of a majority of the shares for the purpose of perpetuating themselves and their successors in office and control of the company at large salaries during their own lives and for years after their death, without regard to the rights of the minority, is an unlawful combination and involves an abuse of trust.¹⁹

§ 8464. **Amotion of Director or Trustee from Office.**—Failure of one elected trustee of a corporation to attend meetings of the board between the month of January, in which he was elected, and the following April, cannot be deemed, as matter of law, such a long-continued neglect of duty as amounts to an abandonment of his office, and warrants his associates in *declaring it vacant* and in

s. c. 28 Atl. Rep. 719. In English Company Law, a provision in the articles of incorporation of a joint stock company, that the office of a director shall be vacated if he fails to acquire a prescribed number of shares within a stated time after his election or appointment, does not apply to a substituted managing director, entitled, under the original agreement, to succeed another on the latter's death or retirement before the expiration of his term: *Bainbridge v. Smith*, 41 Ch. D. 462; s. c. 33 Am. & Eng. Corp. Cas. 172. Removal for abandonment of office, continued neglect of duty, failure to attend meetings, etc.: *Halpin v. Mutual Brewing Co.*, 20 App. Div. (N. Y.) 583; s. c. 47 N. Y. Supp. 412. A clause of the articles of a corporation that all acts done at any meeting of directors, or by any

person acting as director, shall be valid as if he had been duly appointed and was qualified, notwithstanding a defect in his appointment or his disqualification, operates *between the company and its members* as well as in regard to third persons, and will cover irregularities in making a call by directors who have parted with all their shares, but who subsequently acquire other shares, although not formally reappointed: *Dawson v. African Consol. Land & Co.*, (C. A.) (1898) 1 Ch. 6; s. c. 77 Law T. Rep. 392; 67 L. J. Ch. (N. S.) 47.

¹⁷ Pa. Act Apr. 29, 1874; P. L. 73.

¹⁸ *Pennsylvania Milk Producers' Asso. v. First Nat. Bank*, 20 Pa. Co. Ct. 540.

¹⁹ *Snow v. Church*, 13 App. Div. (N. Y.) 108; s. c. 42 N. Y. Supp. 1072.

removing him, without the notice prescribed by the by-laws.²⁰ A member of the board of governors of an association organized for the erection and maintenance of hospitals, infirmaries, orphanages, asylums, and other charitable institutions, cannot be removed from office without an inquiry into and a determination as to the fact of the neglect of the duties imposed on him by the constitution and by-laws of the association, accompanied with notice and an opportunity to be heard in his defense, where the constitution expressly provides therefor; and the rule would be the same even if the constitution and by-laws were silent on the subject.²¹

§ 8465. **Directors Holding Over.**— The old board of directors hold over until a *valid* election for directors to fill their places, and although intervening elections, which are invalid, may take place.²² A statute curing the act of directors who are irregularly elected or disqualified, does not operate to cure the acts of those who, knowing that they have not been re-elected, assume to hold over and discharge the duties of the office.²³

§ 8466. **Elections Deemed Valid until Set Aside in Direct Proceedings.**— Where a direct remedy is given by statute for impeaching a corporate election and is not availed of, the principle which validates the acts of *de facto* directors will prevent a collateral attack on the election, especially in a foreign jurisdiction.²⁴ In Pennsylvania, it is said that where a corporate election is held at the proper place, and the meeting is regular, quiet and orderly, the only way to contest the validity of the election is by *quo warranto*, as provided by statute.²⁵

²⁰ Halpin v. Mutual Brewing Co., 20 App. Div. (N. Y.) 583; s. c. 47 N. Y. Supp. 412.

²¹ State v. Passaic Asso., 59 N. J. L. 142; s. c. 36 Atl. Rep. 702. It has been held, however, that a *majority* of the board of directors may, at a meeting called by the president to take place immediately, at which all the directors are present, pass a resolution removing one of the directors from office, where the by-laws provide that a majority of the board of directors shall constitute a quorum for the transaction of all business, that either the president or secretary may call special meetings whenever he shall deem it expedient to do so, and that any officer may be removed by

the board of directors at any meeting, either general or special: Stobo v. Davis Provision Co., 54 Ill. App. 440; s. c. 8 Nat. Corp. Rep. 446.

²² Jenkins v. Baxter, 160 Pa. St. 199; s. c. 34 W. N. C. (Pa.) 114; 28 Atl. Rep. 682.

²³ Tyne Mut. Ins. Asso. v. Brown, 74 Law T. Rep. 283; distinguishing Briton & Co. v. Jones, 61 Law T. Rep. 384; Mahoney v. East Holyford Mining Co., L. R. 7 H. L. 869; s. c. 33 Law T. Rep. 383.

²⁴ State v. Cronan, 23 Nev. 437; s. c. 49 Pac. Rep. 41.

²⁵ Jenkins v. Baxter, 160 Pa. St. 199; s. c. 34 W. N. C. (Pa.) 114; 28 Atl. Rep. 682.

§ 8467. **Validity of the Acts of De Facto Directors.**— *De facto* directors,— those whose title to the office might be challenged in direct proceedings — those, for example, who are not stockholders when elected,— may, so far as strangers are concerned, do what directors *de jure* might do. They may, for example, issue bonds and make a valid mortgage securing them.²⁶ Stated in another way, one who deals with a corporation whose affairs are in the hands of a *de facto* board of directors, with a *de facto* president and secretary, is not bound to inquire into the legality of the election of such officers, when there are no others claiming to have a different or a better right; but he may deal with such officers though he knows that there were grave irregularities attending their election.²⁷ But this implies that the officers are in the *apparent possession* of the office, and in the apparent exercise of its functions, since otherwise they are not officers *in fact*. It must therefore follow that one who is neither qualified for the office of a director in a corporation, and who, though elected to the office, has never accepted it, nor exercised its functions, nor held himself out as being such a director in any way,— is not to be regarded even as a *de facto* director.²⁸ A board of directors, not such *de jure*, cannot be regarded as such *de facto* when not in possession of the office of the corporation, nor of its seal, records, or property, and where their title to the office is disputed.²⁹

²⁶ Hamilton Trust Co. v. Clemes, 17 App. Div. 152; s. c. 45 N. Y. Supp. 141.

²⁷ Scanlan v. Snow, 22 Wash. L. Rep. 62.

²⁸ Rozecrans Gold Min. Co. v. Morey, 111 Cal. 114; s. c. 43 Pac. Rep. 585.

²⁹ Stated more carefully, there was a meeting of directors on the day after an illegal election, but not at the office of the company; at this meeting a quorum of *de jure* directors was present; the meeting was held without notice to those who were not present, and who had a right to such

notice; those who thus met did not acquire possession of the corporate seal, records and property; their authority was disputed by the *de jure* directors; it was disputed by those who, up to that date, had been president, vice-president and secretary of the corporation; it was disputed by the majority of the executive committee of the corporation. It was held that those who thus met and were not directors *de jure*, were not such *de facto*: Waterman v. Chicago &c. R. Co., 139 Ill. 658; s. c. 15 L. R. A. 418; 29 N. E. Rep. 689.

CHAPTER CXXIX.

POWERS AND MODES OF ACTION OF DIRECTORS.

SECTION	SECTION
8470. Discretionary power of directors not subject to judicial control.	8477. Quorum of directors that can act.
8471. Directors may exercise what powers.	8478. Necessity for quorum of directors who are disinterested.
8472. Authority to enact by-laws.	8479. Validity of acts of a quorum composed partly of non-resident directors.
8473. A few things which directors cannot do.	8480. Right of directors to inspect books and records.
8474. What acts do not require a vote of the directors.	8481. Powers of executive committees of the directors.
8475. What acts do require a vote of the directors.	8482. Where executive committee act and stockholders ratify, vote of directors not necessary.
8476. Invalidity of contracts made with directors separately.	

§ 8470. **Discretionary Power of Directors not Subject to Judicial Control.**— The acts of the board of directors, done in good faith and with honest motives and within the scope of their powers, are not subject to judicial control or revision.¹

§ 8471. **Directors May Exercise what Powers.**— All the business affairs of the corporation — excluding what are called constituent matters which demand the authorization of the stockholders — are committed to the directors both by the common and the statute law. For example, the common-law power of a street railway corporation to *give promissory notes* may be exercised by the board of directors, in which the immediate government and direction of the affairs of the company are vested by statute.² So, the power of an insolvent corporation to *make an assignment for creditors* may be exercised by the directors in the absence of any charter provision to the contrary.³

¹ Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620; s. c. 29 Atl. Rep. 195. Mass. 161; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 473; 45 N. E. Rep. 86.

² Pub. Stat. Mass. ch. 113, § 9; Kneeland v. Braintree Street R. Co., 167 3 Shaw v. Central Build. &c. Asso., 28 Pitts. L. J. (N. S.) 195.

§ 8472. **Authority to Enact By-Laws.**— If the governing statute gives the directors authority to enact by-laws, they may exercise this power, although it is not conferred by the articles of incorporation.⁴

§ 8473. **A Few Things which Directors Cannot Do.**— A partial catalogue — useful to be remembered — of things which the directors of private business corporations cannot do, is as follows: Consent to the act of an officer in converting funds of the corporation to his own use;⁵ issue accommodation paper;⁶ execute a lease which practically divests the corporation of all its property;⁷ delegate all their powers of management to an executive committee of their number.⁸ Directors of a *public* corporation cannot maintain a suit to contest the validity of a lien made by the corporation upon property vested in it for public use,— the right of action, if any, being in the State.⁹

§ 8474. **What Acts Do not Require a Vote of the Directors.**— The following acts are not of sufficient solemnity or importance to require a vote of the directors:— The making by a mercantile or manufacturing corporation of ordinary contracts — those made by correspondence by the proper agent or manager,¹⁰ or by its regular corresponding secretary;¹¹ the assignment of an account by its secretary and general manager;¹² the borrowing of money by the corporation, no resolution being entered on the minutes;¹³ the institution of a proceeding to enforce a statutory lien against a stockholder for a past-due indebtedness to the corporation;¹⁴ the chartering of vessels necessary to carry on the ordinary business of

⁴ Houdeck v. Merchants' &c. Ins. Co., 102 Iowa, 303; s. c. 71 N. W. Rep. 354.

⁵ I. X. L. Pressed Brick Co. v. Schoeneich, 65 Mo. App. 283.

⁶ Hutchinson v. Sutton Man. Co., 57 Fed. Rep. 998.

⁷ Mercantile Library Hall Co. v. Pittsburgh Library Asso., 173 Pa. St. 30; s. c. 37 W. N. C. (Pa.) 533; 27 Pitts. L. J. (N. S.) 25; 33 Atl. Rep. 744.

⁸ Tempel v. Dodge, 89 Tex. 68; s. c. 12 Am. R. & Corp. Rep. 172; 32 S. W. Rep. 514; rehearing denied in s. c. 33 S. W. Rep. 222.

⁹ Smith v. Cornelius, 41 W. Va. 59; s. c. 30 L. R. A. 747; 23 S. E. Rep. 599.

¹⁰ Scofield v. Parlin &c. Co., 61 Fed. Rep. 804.

¹¹ Hall v. Herter Bros., 90 Hun (N. Y.) 280; s. c. 70 N. Y. St. Rep. 273; 35 N. Y. Supp. 769.

¹² Tuller v. Arnold, 98 Cal. 522; s. c. 33 Pac. Rep. 445. See also Greig v. Riordan, 99 Cal. 316; s. c. 33 Pac. Rep. 913.

¹³ Bank of Yolo v. Weaver, (Cal) 31 Pac. Rep. 160.

¹⁴ Elliott v. Sibley, 101 Ala. 344; s. c. 13 South. Rep. 500.

a steamship company in transporting passengers and freight;¹⁵ the institution of a proceeding to condemn lands by a water supply company.¹⁶

§ 8475. **What Acts Do Require a Vote of the Directors.**—On the other hand, the following acts have been held of such solemnity and importance as to require, in order to their validity, a vote of the directors:—A *mortgage* of the property of the corporation as security for a loan;¹⁷ an *assignment* of all the property of the corporation for the benefit of its creditors;¹⁸ the giving of notice of the termination of a contract entered into by the corporation whereby it agreed to pay royalties for the right to manufacture under a *patent*.¹⁹

§ 8476. **Invalidity of Contracts Made with Directors Separately.**—The directors must, in strictness, meet and act together as a board, and their separate assent is not binding on the corporation in the absence of a ratification.²⁰

§ 8477. **Quorum of Directors that can Act.**—By statute in Pennsylvania a *majority* of the whole number of directors is necessary

¹⁵ Prentice v. United States &c. Steamship Co., 58 Fed. Rep. 702.

¹⁶ Kountze v. Morris Aqueduct, 58 N. J. L. 303; s. c. 33 Atl. Rep. 252; aff'd in 34 Atl. Rep. 1099.

¹⁷ Currie v. Bowman, (Or.) 35 Pac. Rep. 848; s. c. 44 Am. & Eng. Corp. Cas. 662; State Nat. Bank v. Union Nat. Bank, 168 Ill. 519; aff'g s. c. 68 Ill. App. 25; 2 Chi. L. J. Weekly, 36. In this case the power is conceded to the president of a corporation to secure its debts by making a mortgage upon some of its property; but where he professes to act in pursuance of a resolution of the board of directors, the resolution must be valid, or his act will not be good as against creditors.

¹⁸ Norton v. Alabama Nat. Bank, 102 Ala. 420; s. c. 14 South. Rep. 872; Webb v. Midway Lumber Co., 68 Mo. App. 546.

¹⁹ Skinner v. Walter A. Wood Mowing &c. Mach. Co., 47 N. Y. St. Rep. 506; s. c. 20 N. Y. Supp. 251. An *assignment* for creditors by a corporation, in pursuance of an order of three of the six directors, is invalid,

where the statute requires a *majority of the whole board to make a quorum*: Webb v. Midway Lumber Co., 68 Mo. App. 546. A resolution adopted by less than two-thirds of the directors of a corporation, confirming a mortgage previously executed in pursuance of a resolution which was invalid under Ill. Rev. Stat., ch. 32, § 20, because the meeting of the board was held outside the State without the authority of two-thirds of the directors, or authorizing a new mortgage, does not affect an *attachment lien* acquired upon the property in the meantime, and such lien takes precedence of the mortgage. State Nat. Bank v. Union Nat. Bank, 168 Ill. 519; s. c. 48 N. E. Rep. 82; aff'g s. c. 68 Ill. App. 25; 2 Chi. L. J. Weekly, 36; citing McKeag v. Collins, 87 Mo. 164; Trumbull v. Union Trust Co., 33 Ill. App. 319; Holland v. Drake, 29 Ohio St. 441; Coleman v. Darling, 66 Wis. 155; s. c. 57 Am. Rep. 253; Stein v. La Dow, 13 Minn. 412.

²⁰ Addison v. Pacific Coast Milling Co., 79 Fed. Rep. 459.

to constitute a quorum. A by-law which fixes the number of directors at *six*, and provides that *three* of them shall constitute a quorum, is hence invalid.²¹ An amendment to a by-law of a corporation, merely changing the number necessary to constitute a quorum of the board of directors, does not alter another by-law requiring a *vote of two-thirds* of the directors to remove or suspend an officer of the company.²² Under the statute law of New Jersey which provides that "the directors shall not be less than three in number," if a board of directors be constituted of three members, and one of them ceases to be a director for any reason whatever, there is no longer such a board of directors as the statute contemplates. If, therefore, the board of directors of the corporation consists of three members only, and one of them vacates the office, the remaining two cannot authorize a mortgage on the property of the corporation such as will give priority over general creditors.²³ The reason is, not that there is not a *quorum*, but that there is not a lawfully constituted board from which a quorum can be made.

§ 8478. Necessity for Quorum of Directors who are Disinterested.—

A valid quorum must be a quorum of directors who are not interested in the transaction which is to come before the board. If some of the directors are interested, and if but for their votes, a given resolution could not be passed, the step thus taken is voidable at the instance of the corporation or the stockholders, subject to the qualifications elsewhere considered.²⁴

§ 8479. Validity of Acts of a Quorum Composed Partly of Non-Resident Directors.— The validity of a *mortgage* made by a corporation is not affected by the fact that some of the directors by whom the resolution authorizing the mortgage was passed, did not reside in the State in which the corporation was organized, or that they went into the State and remained there only a brief period to hold the meeting at which such resolution was passed; since they were at least *de facto* directors.²⁵

²¹ *Curry v. Claysville Cemetery Asso.*, 5 Pa. Super. Ct. 289; s. c. 40 W. N. C. (Pa.) 536; 28 Pitts. L. J. (N. S.) 81.

²² *Stockton v. Harmon*, 32 Fla. 312; s. c. 13 South. Rep. 833.

²³ *Wright v. First Nat. Bank*, 52 N. J. Eq. 392; s. c. 28 Atl. Rep. 719.

²⁴ *San Antonio Street R. Co. v. Adams*, 87 Tex. 125; s. c. 26 S. W. Rep. 1040; rev'g 25 S. W. Rep. 639.

²⁵ *Wheelwright v. St. Louis &c. Transp. Co.*, 56 Fed. Rep. 164.

§ 8480. **Right of Directors to Inspect Books and Records.**— Every director has a right to inspect the books and records of the corporation, in order to ascertain what the corporation is doing, and the majority of the board cannot lawfully exclude a minority from this right.²⁶

§ 8481. **Powers of Executive Committees of the Directors.**— The general rule being that the directors cannot delegate their discretionary powers to an executive committee of their members,²⁷ it seems plain that such a committee may not mortgage the land of the company to raise money to pay current expenses.²⁸ The executive committee of the directors of a *boom company* may, however, exercise the powers of the directors in *fixing the tolls* to be exacted from owners of logs for driving them down a river, that being a matter of ordinary business, like the price to be asked for any commodity or service which a corporation may have for sale.²⁹ The executive committee of a corporation, which is authorized by the board of directors to “make the necessary arrangements” for securing the transfer of a certain patent right, may bind the corporation by a contract for such transfer, without further action by the board.³⁰ A committee empowered by the directors of a corporation to negotiate for purchasers and to sell an issue of bonds have power to *employ a broker* for such sale; but they cannot, in the absence of special authority, authorize a broker to secure a purchaser at less than par.³¹

§ 8482. **Where Executive Committee Act and Stockholders Ratify, Vote of Directors not Necessary.**— This principle rests upon the soundest foundation, because the stockholders are the proprietors

²⁶ *Stone v. Kellogg*, 62 Ill. App. 444; s. c. 12 Nat. Corp. Rep. 34; 1 Chic. L. J. Wkly. 67.

²⁷ *Tempel v. Dodge*, 89 Tex. 68; s. c. 12 Am. R. & Corp. Rep. 172; 32 S. W. Rep. 514; rehearing denied in 33 S. W. Rep. 222.

²⁸ The Superior Court of Cincinnati have held that a provision of the constitution of a corporation, for the appointment of an executive committee of the board of directors, to have charge of the management and business affairs of the company, with power to make investments and generally to discharge the duties of the

board, but not to incur debts except for current expenses unless specially authorized,— does not empower such committee to mortgage the realty of the company to pay current expenses: *Ohio Valley Nat. Bank v. Walton Architectural Iron Co.*, 30 Ohio L. J. 382.

²⁹ *Black River Imp. Co. v. Holway*, 85 Wis. 344; s. c. 55 N. W. Rep. 418.

³⁰ *Andres v. Fry*, 113 Cal. 124; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 611; 45 Pac. Rep. 534.

³¹ *East Cleveland R. Co. v. Everett*, 15 Ohio C. C. 181; 8 Ohio C. D. 210.

and the ultimate constituency. When, therefore, they authorize a thing to be done, or ratify it after it has been done, without the requisite formality, it would be absurd to hold it void because there was wanting the formal authorization of their own agents or servants. On this principle it was held that a resolution of the board of directors of the Union Pacific Railroad Company was not essential to the validity of a contract on its part to give the joint use of its bridge and terminal facilities at Omaha to another company, which had been approved by its executive committee and the body of its stockholders at their respective meetings, under the provisions of its charter and by-laws and a resolution of the board thereunder giving such committee all the powers of the board when not in session; especially since such contract was not one of the acts which were required by any statute to be done by the board.³²

³² Union Pacific R. Co. v. Chicago Rep. 309; aff'g s. c. 47 Fed. Rep. 15. &c. R. Co., 163 U. S. 564; aff'g s. c. Status of *government directors* of *sub nom.* Re Omaha Bridge Cases, 10 Union Pacific R. Co.: Union Pacific U. S. App. 98; s. c. 51 Am. & Eng. R. Co. v. Chicago &c. R. Co *supra*. R. Cas. 162; 2 C. C. A. 174; 51 Fed.

CHAPTER CCXX.

MEETINGS OF DIRECTORS.

SECTION

8485. Meetings of directors, where held.

8486. Right of all the directors to notice of meetings.

8487. Whether notice must state the business to be transacted.

SECTION

8488. Informalities in assembling meeting cured where all meet without dissent and act.

8489. Notice good although signed by rubber stamp.

8490. Notice may be sent by mail.

§ 8485. **Meetings of Directors, Where Held.**— In the absence of fraud, or of the dissent or non-attendance of some of the directors, there is no sound reason for treating the proceedings which take place at a directors' meeting held outside the State as void, or even as requiring a ratification. There are statutes authorizing the holding of directors' meetings outside the State, and there are statutes prohibiting them from being so held. Thus, a statute of Illinois enacts as follows: "The by-laws of every corporation shall provide for the calling of meetings of the directors, trustees, or other officers corresponding to trustees; and when all such officers shall be present at any meeting, however called or notified, or shall sign a written consent thereto on the record of such meeting, the acts of such meeting shall be as valid as if legally called and notified; provided that the action of any meeting held beyond the limits of this State shall be void unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors, trustees, or officers corresponding to trustees, at a regular meeting."¹ In administering this statute, the Supreme Court of that State held that a mortgage authorized at a meeting of directors held in another State, not so formally consented to nor ratified, was void; that the statute was not intended merely for the protection of stockholders, but for the protection of creditors as well; and hence that a mortgage so authorized may be assailed and overthrown at the suit of creditors; and that an

¹ Rev. Stat. Ill., ch. 32, § 20.

attaching creditor secures a valid lien upon the mortgaged property by the levy of his attachment before the mortgage is ratified.² A by-law of a corporation enacted (it may be assumed) in pursuance of the above statute, requiring that "regular" meetings of the board of directors shall be held at its general office, does not prevent the holding of special meetings at any place that would be lawful in the absence of such a restriction.³

§ 8486. **Right of All the Directors to Notice of Meetings.**—The general rule is that all the directors of a corporation are entitled to notice of any meeting at which any corporate business is to be transacted, in order to make the action which takes place at any such meeting valid and binding.⁴ It should be added that, with reference to the notice to be given of stockholders' and directors' meetings, the provisions of the *by-laws*⁵ and *articles of incorporation*⁶ must yield to the governing statute where they conflict, as in other cases. This rule yields to the exception that, in case of *regular* or *stated* meetings, which are required by the governing statute, articles or by-laws, to be held at a stated time and place, no special notice is required, since the law of the corporation is notice.⁷ On the other hand, if a majority of the directors meet at an unusual time and place, without notifying all the members of the board, the acts which take place at the meeting are not valid.⁸

² State Nat. Bank v. Union Nat. Bank, 168 Ill. 519; s. c. 48 N. E. Rep. 82; aff'g 68 Ill. App. 25; s. c. 2 Chic. L. J. Wkly. 36; citing McKeag v. Collins, 87 Mo. 164; First Nat. Bank v. Asheville Furniture &c. Co., 116 N. C. 827; Hoyt v. Thompson, 5 N. Y. 320; National State Bank v. Vigo County Nat. Bank, 141 Ind. 352.

³ Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149; s. c. 45 N. E. Rep. 410; aff'g s. c. 60 Ill. App. 179.

⁴ Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78. It is almost needless to suggest that a minority of directors cannot waive this right: Hill v. Rich Hill Coal Min. Co., 119 Mo. 9; s. c. 24 S. W. Rep. 223; First Nat. Bank v. Asheville Furniture &c. Co., 116 N. C. 827.

⁵ Charter Gas Engine Co. v. Charter, 47 Ill. App. 36.

⁶ Republican Mountain Silver Mines v. Brown, 58 Fed. Rep. 644; s. c. 24 L. R. A. 776; 7 C. C. A. 412.

⁷ 1 Thomp. Corp., § 707, note 2.

⁸ First Nat. Bank v. Asheville Furniture &c. Co., 116 N. C. 827. A special meeting of the directors of a corporation, of which no notice is given to members who are absent, is invalid, where the by-laws of the corporation require ten days' notice in writing, of a special meeting, to be given to each of the directors: Hill v. Rich Hill Coal Min. Co., 119 Mo. 9; s. c. 24 S. W. Rep. 223. The fact that one of the directors holds a *large majority of the stock* in a corporation does not render valid a special meeting of the directors held without notice and without a quorum, where a by-law of the corporation requires ten days' notice, in writing, of a special meeting to be given to each director: Hill v. Rich Hill Coal Min. Co., 119 Mo. 9; s. c. 24 S. W. Rep. 223. Assembling a meeting of directors without notice to two of them, ousting one of the directors and

The rule yields to the further principle that where there is a *custom* of the directors to hold meetings for the transaction of business at a certain time and place, special notice of such meetings is not necessary in order to validate *such* business transacted thereat.⁹ It yields to the further principle that where a meeting is regularly assembled, but *adjourns* to a future time and place, special notice of the adjourned meeting is not necessary, since the fact and record of the adjournment give such notice.¹⁰ It yields to the further principle that the failure to give notice is *waived*, or rendered of no importance — in whatever way it is to be regarded — where, notwithstanding the want of notice, all the directors meet and consult and participate in the business of the meeting.¹¹ It has been held that, in the absence of a *by-law*, or *custom* to the contrary, at least *one full day's notice* should be given of a directors' meeting. Therefore, a notice for a special meeting of the board of managers of a corporation is *prima facie* insufficient in time, where it calls for a meeting at 4 o'clock of the day succeeding that upon which it is mailed to the members, and there is no evidence that any director received the notice until the morning of the day appointed for the meeting.¹²

electing another, and attempting to show a quorum by altering the records, etc.,—proceedings void: *Hatch v. Johnson Loan &c. Co.*, 79 Fed. Rep. 828.

⁹ For example, a regular *custom* pursued for a number of years, for the directors of a bank to hold a meeting at the banking-house during business hours whenever a sufficient number are present, is notice to each director of a meeting to be held within the business hours of the bank whenever a sufficient number assemble, and enables those assembled, the same being a quorum, to proceed, in the absence of some restraining provision in some statute or governing instrument: *American Exch. Nat. Bank v. First Nat. Bank*, 82 Fed. Rep. 961; s. c. 48 U. S. App. 633; 27 C. C. A. 274. The court cite: *Paola &c. R. Co. v. Anderson County*, 16 Kan. 302, 308; *Bank of Middlebury v. Rutland &c. R. Co.*, 30 Vt. 159; *Waite v. Windham County Min. Co.*, 37 Vt. 608; *Edgerly v. Emerson*, 23 N. H. 555; s. c. 55 Am. Dec. 207.

¹⁰ *Western Improv. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455;

s. c. 72 N. W. Rep. 657. But, unless the meeting at which the adjournment took place, had been properly notified, the adjourned meeting is irregular and the acts performed thereat are not valid: *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78; s. c. 27 Atl. Rep. 897. It has been held that an *assignment of the accounts* of a corporation to its president as collateral security for his indorsement upon its notes, cannot be made at an adjourned meeting, where no notice is given to the directors that such business would be transacted, either in the call for the meeting which was adjourned, or at such adjourned meeting, if one of the directors is absent: *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78; s. c. 27 Atl. Rep. 897.

¹¹ *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381; s. c. 55 N. W. Rep. 546.

¹² *Mercantile Library Hall Co. v. Pittsburgh Library Asso.*, 173 Pa. St. 30; s. c. 37 W. N. O. (Pa.) 533; 33 Atl. Rep. 744; 27 Pitts. L. J. (N. S.) 25.

§ 8487. **Whether Notice Must State the Business to be Transacted.**—Where a special meeting is called for *extraordinary purposes*, it is obviously necessary that the notice by which it is convened should state the business to be brought before it, since each director is entitled to be apprised of any fact which renders his attendance peculiarly important. It was so held where the notice stated the object of the meeting to be “to hear the treasurer’s report, and transact any other business which may come before them.” In point of fact the meeting was called to authorize the making of a lien which practically divested the corporation of all its property. It was held that the meeting had not been properly warned or notified, and that the action of the directors at the meeting in authorizing the lien was voidable.¹³ A by-law passed by a corporation, which is ineffectual because no notice of an intention to pass a by-law was given as required by the charter, is not binding on the directors of the corporation as an expression of the will of the members.¹⁴ On the other hand, a general notice of a directors’ meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the *ordinary business affairs* of the corporation.¹⁵ It has been held that the authorizing of the execution of a mortgage to secure the payment of an account contracted by the corporation in its ordinary business, is not such extraordinary business as to require it to be stated in a notice of the meeting of the directors convened for that purpose.¹⁶ A notice of a meeting of directors of a corporation need not state the business to be transacted, where it is called upon an *adjournment* of a prior meeting subject to meet at the call of the president for the report of a committee appointed upon the business to be transacted, and the business is the execution of a mortgage to secure an account contracted in the ordinary business of the corporation.¹⁷

¹³ Hill v. Rich Hill Mining Co., 119 Mo. 9; Mercantile Library Hall Co. v. Pittsburgh Library Asso., 173 Pa. St. 30; s. c. 37 W. N. O. (Pa.) 533; 33 Atl. Rep. 744; 27 Pittsb. L. J. (N. S.) 25. The necessity of stating in the notice the business to be transacted at the meeting may, under some governing statutes, arise even in the case of meetings for the election of directors,—as where it is attempted to amend by-laws at such a meeting; Mutual Fire Ins. Co. v. Farquhar,

86 Md. 668; s. c. 39 Atl. Rep. 527; citing Kent v. Quicksilver Min. Co., 78 N. Y. 159, 182; Com. v. Lancaster, 5 Watts (Pa.) 152.

¹⁴ Mutual F. Ins. Co. v. Farquhar, 86 Md. 668; s. c. 39 Atl. Rep. 527.

¹⁵ Argus Co. v. Manning, 138 N. Y. 557; s. c. 53 N. Y. St. Rep. 270; 48 Alb. L. J. 24; 34 N. E. Rep. 388.

¹⁶ Ashley Wire Co. v. Illinois Steel Co., 60 Ill. App. 179; s. c. aff’d, 164 Ill. 149; s. c. 45 N. E. Rep. 410.

¹⁷ Ashley Wire Co. v. Illinois Steel

§ 8488. **Informalities in Assembling Meeting Cured where All Meet without Dissent and Act.**— Although a special meeting of the directors may not have been regularly assembled, yet the informality is cured where all the directors assemble, express no objection, and act.¹⁸

§ 8489. **Notice Good Although Signed by Rubber Stamp.**— The fact that the signature of the secretary of a corporation to a notice of a meeting of directors was made by a rubber stamp in the hands of the president did not affect the validity of the meeting, where the secretary attended the meeting, recorded its proceedings, and treated it as regularly called, and the directors treated it as binding upon them.¹⁹

§ 8490. **Notice May be Sent by Mail.**— A written notice of a meeting of the board of directors of a corporation may be sent by mail, unless otherwise provided in the by-laws, under a statute²⁰ providing that in such a case all meetings must be called "by special notice in writing, to be given to each director."²¹

Co., 164 Ill. 149; s. c. 45 N. E. Rep. 410; aff'g s. c. 60 Ill. App. 179. In England, the directors of a company can, at any meeting of the board, deal with all affairs of the company then requiring attention, whether ordinary or not; and previous notice of the special business to be transacted is not a necessary condition of the proceedings being valid. They can, for instance, appoint a director, appoint solicitors and bankers, and accept an offer for the use of offices: *La Compagnie de Mayville v. Whitley*, (C. A.) (1896) 1 Ch. 788; s. c. 74 Law T. Rep. 441.

¹⁸ *Stobo v. Davis Provision Co.*, 54 Ill. App. 440; *Minneapolis Times Co.*

v. Nimocks, 53 Minn. 381. See also *Jordan v. Collins*, 107 Ala. 572; *United Growers Co. v. Eisner*, 22 App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906; citing *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 136. When promissory note authorized at meeting assembled without notice is invalid in hands of one not a *bona fide* holder: *Close v. Potter*, 5 Misc. (N. Y.) 543; s. c. 25 N. Y. Supp. 972.

¹⁹ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149; s. c. 45 N. E. Rep. 410; s. c. aff'd, 60 Ill. App. 179.

²⁰ Cal. Civ. Code, § 320.

²¹ *Stockton Combined & C. Works v. Houser*, 109 Cal. 1, 10; s. c. 41 Pac. Rep. 809.

CHAPTER CCXXI.

OBLIGATIONS OF DIRECTORS AS FIDUCIARIES.

SECTION	SECTION
8493. Directors and officers must account for secret profits made out of their trust.	8503. Right of directors to purchase for themselves at judicial sales of the corporate property.
8494. Cases not within the foregoing principle.	8504. Paying or securing their individual debts with corporate property or credit.
8495. Right of directors and officers to take security for <i>bona fide</i> advances.	8505. View that directors and officers are <i>quasi</i> -trustees for individual shareholders.
8496. Whether directors may prefer themselves as creditors.	8506. Directors chargeable with knowledge of condition of corporation.
8497. Cannot indemnify co-surety of a director.	8507. Chargeable with notice of action of board.
8498. Purchasing outstanding notes of the corporation.	8508. When fiduciary relations of directors terminate.
8499. Acting for opposing interests.	8509. No right of lien on lands purchased by railway directors for speculative purposes along right of way.
8500. Contracting for the corporation with themselves as individuals.	
8501. Circumstances under which such contracts have been annulled.	
8502. Contracts between two corporations having common directors or contracting officers.	

§ 8493. **Directors and Officers Must Account for Secret Profits Made out of Their Trust.**—Directors and other officers of corporations, who act for it in making contracts with third parties, are bound to use their best diligence and judgment in behalf of the company, untrammelled by the influence of any opposing interest in themselves or others. They can hence make no profit out of their trust except openly and with the consent of the corporation; but whatever secret profit they make is the profit of the corporation, and they may be compelled to account to the corporation for it in any proper proceeding.¹ A vulgar form of breach of trust by the

¹ Bird Coal &c. Co. v. Humes, 157 Pa. St. 278; s. c. 33 W. N. C. (Pa.) 174; 27 Atl. Rep. 750; Redhead v. Parkway Driving Club, 148 N. Y.

contracting officers of a corporation is to demand and receive "*commissions*" from the other contracting party. For such bribes they must account to the corporation under the foregoing principle.² So, a "*rebate*" from the purchase price of property sold to a corporation, procured by a member of the purchasing committee, inures to the benefit of the corporation, although he is a member of a firm of real estate brokers, and may be accountable to the firm for the amount of such rebate as "*commissions*."³ So, if a person consents to an act as director of a corporation, and, under the governing statute, is obliged to be owner of a given number of shares to qualify him for the office, and is secretly indemnified by a promoter of the company against loss in purchasing the shares, and the shares become worthless, and the promoter pays the indemnifying money to the director, the payment is a payment to the use of the company, and, upon its becoming insolvent, the director is bound to account for it as for a breach of trust.⁴ Nor do the vermiculations by which the unfaithful officer endeavors to conceal the real nature of the transaction have any other effect than to show his guilty *scienter*, and thus furnish evidence against him.⁵

§ 8494. Cases not Within the Foregoing Principle.—The English Court of Appeal have held that a provision in an agreement between two corporations for the sale of the undertaking of the one to the other, that a substantial sum shall be paid to the directors of the selling company as compensation for loss of office, does not invalidate the agreement, but the notice convening the meeting of shareholders to consider the agreement should refer to such provision.⁶ A contract by the directors, who constitute all but one of the stockholders of a railroad company, by which

471; s. c. 42 N. E. Rep. 1047; aff'g s. c. 7 Misc. (N. Y.) 275. If a director opposes a transaction between his corporation and third persons, and the latter *buy him off* and give their note to him as the price of his treachery, he cannot, on grounds of public policy, recover on the note: *Kauffman v. Keiper*, 5 Northampton Co. Rep. (Pa.) 244; s. c. 5 Pa. Dist. Rep. 620; 18 Pa. Co. Ct. 181.

² *Jameson v. Coldwell*, 25 Or. 199; s. c. 35 Pac. Rep. 245.

³ *Redhead v. Parkway Driving Club*, 148 N. Y. 471; s. c. 42 N. E.

Rep. 1047; aff'g s. c. 7 Misc. (N. Y.) 275.

⁴ *Re Archer's Case*, [1892] 1 Ch. 322; following *Hay's Case*, L. R. 10 Ch. 593,—*Pearson's Case*, 5 Ch. Div. 336; and distinguishing *Bentinck v. Fenn*, 12 App. Cas. 652.

⁵ See, for illustration, *Rutland Electric Light Co. v. Bates*, 68 Vt 579; s. c. 35 Atl. Rep. 480.

⁶ *Kaye v. Croydon Tramways Co.*, (C. A.) (1898) 1 Ch. 353; s. c. 67 L. J. Ch. (N. S.) 222; 78 Law T. Rep. 237.

all its stock and bonds are turned over to contractors to build the road, the profits to be divided with such directors, is not void, but voidable at the instance of any party unfavorably affected by it; and when neither the corporation nor the remaining stockholder dissents, the fact that the directors receive such profits is not available to the contractors as a defense to a suit in behalf of such directors therefor,— especially when they retain the fruits of the contract. The reasoning of Judge Shipman treated the contract as not being of that character which the courts will not assist to execute on grounds of public policy, but rather as a contract which is voidable at the instance of any party defrauded by it, but is nevertheless valid in the sense that the obligor in it cannot be heard to set up the rights of supposed third parties as a reason for not performing it on his part, when such third parties had not complained.⁷ No doubt the conclusion may be extracted from the case that the doctrine under consideration has no application to a case where the promoters of a railroad company not properly organized, but which exists in form merely, owning all its potential stock and contracting with a third person for the building of its road in exchange for its stock and bonds, the promoters to receive half the profits upon the sale by the contractor of the stock and bonds. Here, there being no question as to the rights of the creditors, the transaction is done openly as to all who might have an interest to oppose; it is validated by unanimous consent.⁸ It is to be constantly kept in mind that the principle applies only to the case where *secret* profits or advantages are acquired by contracting officers of a corporation; in other words, where they make a secret profit out of their trust. As stated elsewhere,⁹ it does not apply to transactions which are *open*, fair and acquiesced in by those having the right to object, although a profit may accrue therefrom to the directors or officers of the corporation. For example, it has been held that the stockholders and directors of a manufacturing corporation, who, with their own money and on their own credit and risk, erect new works, may make a profit thereon upon the sale to such corporation of such works, and are not accountable therefor,— especially where the transaction is advantageous to the corporation, has been ratified

⁷ Robison v. McCracken, 52 Fed. Rep. 726.

⁸ McCracken v. Robison, 57 Fed. Rep. 375; s. c. 6 C. C. A. 400.

⁹ 3 Thomp. Corp., § 4052; and see the preceding case.

by a unanimous vote at a stockholders' meeting, and an opportunity is given the stockholders to rescind, with full knowledge of all the facts; and where opportunity was also given to the corporation to erect such works before their construction was undertaken by the directors.¹⁰ Nor, in the opinion of a Federal Court of Appeals, did the principle extend so far as to prevent the directors of a manufacturing corporation, pending negotiations for its consolidation with another corporation, to enter into their personal covenants, for a fair consideration, not to engage in the same manufacture for a stated period.¹¹

§ 8495. Right of Directors and Officers to Take Security for Bona Fide Advances.—The right of a corporation to give security to its directors or other officers for *bona fide* present advances made to the corporation is unquestioned.¹²

§ 8496. Whether Directors May Prefer Themselves as Creditors.—It is a disgrace to the American judiciary that any difference of opinion should have arisen upon this question. A correct sense of justice revolts at the idea that the directors and managing officers of a corporation, who have enjoyed the best means of knowing, when they contracted debts for the corporation, whether it would be able to pay them; who are in part proprietors, and hence in substance and in fact co-debtors with the other stockholders,—should be allowed to avail themselves of their means of knowledge which their creditors do not possess, to get an advantage over outside creditors whom they have duped into giving credit to the corporation, that is to say, to themselves. A conscience which can look with indifference upon such a proceeding is not fit for a position on the judicial bench. Gratifying decisions are met with which condemn such preferences.¹³ One decision makes a weak straddle of the question by holding that such a preference is *prima facie*

¹⁰ *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. Rep. 86; s. c. 6 C. C. A. 260; aff'g 51 Fed. Rep. 33.

¹¹ *Bristol v. Scranton*, 57 Fed. Rep. 70.

¹² *Osborne v. Marks*, 14 Ky. L. Rep. 606; s. c. 21 S. W. Rep. 101. Thus, an incorporated fair association which, when about to open its exposition, found itself short of necessary funds, could lawfully agree to

set aside 75 per cent. of its gate fees to indemnify its accommodation indorsers, although some of them were members of its directory: *Smith v. National &c. Asso.*, 47 Mo. App. 462.

¹³ *Hill v. Pioneer Lumber Co.*, 113 N. C. 173; s. c. 21 L. R. A. 560; 18 S. E. Rep. 107; *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624; s. c. 17 S. E. Rep. 968.

fraudulent and void, and will be so declared, unless it be shown by the most clear and convincing proof that such preference was not only free from fraud, but was in itself, under the circumstances, both fair and reasonable.¹⁴ Such a conveyance should be regarded as fraudulent in law, to be treated as valid only in case the outside creditors who are postponed by it, become for some reason estopped to assail it. Still other courts degrade justice to the extent of holding that such preferences are lawful where the corporation has the power to prefer any of its creditors; that is to say, if the corporation has the power, under the local law, to prefer any of its creditors, the men who compose it and who contracted the debts for it,—that is, for themselves,—may prefer themselves.¹⁵ In Georgia, the directors of an insolvent corporation cannot, to the prejudice of any of its creditors, indemnify, by mortgage of its assets, one or more of their own body against loss by reason of a suretyship for the corporation upon liabilities already incurred, in the absence of any agreement or undertaking for such indemnity at the time the liabilities were incurred.¹⁶

§ 8497. Cannot Indemnify Co-Surety of a Director.—Directors of a corporation cannot indemnify against an existing liability, a *co-surety* of a fellow director; since indemnity of one surety inures by operation of law to the benefit of the others; and violates the principle that directors cannot prefer themselves as creditors out of the corporate assets.¹⁷

§ 8498. Purchasing Outstanding Notes of the Corporation.—It is a breach of trust and duty for the directors, or other fiduciary officers of a corporation, to buy up its outstanding obligations and endeavor to enforce them against the corporation. In such a case, in distributing the assets of an insolvent corporation, the principles of equity will allow the unfaithful officer to have — not the face value of the obligation — but no more than what he actually paid out.¹⁸

¹⁴ *Hulings v. Hulings Lumber Co.*, 38 W. Va. 351; s. c. 18 S. E. Rep. 620.

¹⁵ *Brown v. Grand Rapids & C. Co.*, 58 Fed. Rep. 286; s. c. 22 L. R. A. 817; 7 C. C. A. 225; *Doyle v. Leitelt*, 97 Mich. 298; s. c. 56 N. W. Rep. 553; *Keeney v. Converse*, 99 Mich. 316; s. c. 58 N. W. Rep. 325; (case where an unsuccessful attack was made by a stockholder upon a mort-

gage of corporate property made to a director).

¹⁶ *Lowry Bkg. Co. v. Empire Lumber Co.*, 91 Ga. 624; s. c. 17 S. E. Rep. 968.

¹⁷ *Lowry Bkg. Co. v. Empire Lumber Co.*, 91 Ga. 624; s. c. 17 S. E. Rep. 968.

¹⁸ *Bonney v. Tilley*, 109 Cal. 346; s. c. 42 Pac. Rep. 439.

§ 8499. **Acting for Opposing Interests.**— The directors and contracting officers of the corporation stand in the position of *fiduciaries* towards the corporation and its shareholders. Consequently, the law does not allow them, in making contracts for the corporation, to represent an opposing interest. This most frequently happens where a director or other contracting officer of a corporation is also a director or contracting officer of another corporation, and the same officer makes a contract between the two corporations. Such contracts are contracts between two separate legal entities and are not void at law. Nor do courts of equity treat them as being void *ab initio*, but as capable of being made good by ratification. On the contrary, they are voidable, in a proper proceeding taken for that purpose; nor will the courts execute them against the objection of the injured corporation so long as they remain *in force*.¹⁹ This doctrine has been applied where the manager of one corporation assumed to make a contract for it for the purchase of goods from another corporation of which he was president.²⁰ When it is said that such contracts are not void *ab initio*, but are merely voidable and hence capable of ratification, the conclusion necessarily follows that, as in case of other contracts procured by fraud,²¹ any proceeding to rescind them must be taken in time, and that such proceedings cannot be taken after the rights of innocent third parties have supervened.²² There is also room for the view that, while equity will scrutinize such contracts and set them aside on the least appearance of unfairness, yet this will not be done upon the mere fact being shown that the directors of the corporation were so situated with reference to the action which their votes in the directorate caused to be taken, that the transaction inured to their personal benefit, where it was also plainly beneficial to the corporation.²³

§ 8500. **Contracting for the Corporation with Themselves as Individuals.**— Nor is a contract made by a corporation through its con-

¹⁹ Charter Gas Engine &c. Co. v. Charter, 47 Ill. App. 36; Davis Provision Co. v. Fowler Bros., 20 App. Div. (N. Y.) 626; s. c. 47 N. Y. Supp. 205.

²⁰ Michigan Slate Co. v. Iron Range &c. R. Co., 101 Mich. 14; s. c. 50 N. W. Rep. 646.

²¹ 2 Thomp. Corp., § 1438, *et seq.*

²² Genesee &c. R. Co. v. Retsof Min. Co., 15 Misc. (N. Y.) 187; s. c. 36 N. Y. Supp. 896; 72 N. Y. St. Rep. 231.

²³ Of this a good illustration is afforded by Bucksport &c. R. Co. v. Edinburgh &c. Redwood Co., 68 Fed. Rep. 972; s. c. 29 U. S. App. 731; 16 C. C. A. 74.

tracting officers, with themselves as individuals, void at common law or in equity. In the theory of the law, there are still two contracting parties, the corporation on the one hand, and the individuals who form the opposite party to the contract on the other;²⁴ and, beyond question, such a contract is capable of being ratified by the lawful action of the board of directors expressed by a vote taken by a disinterested quorum,²⁵ or by the stockholders;²⁶ but, as in the case of other voidable contracts,²⁷ it cannot be ratified in part and rejected in part.²⁸ And such contracts will be upheld in equity when fair and honest.²⁹ For instance, a director who has, in good faith, loaned his money to the corporation to assist it in accomplishing its proper and necessary corporate purposes, has a valid claim against the corporation for reimbursement.³⁰ So, a contract between a trustee of a corporation and the board of which he is a member, fixing his salary, is not void, but voidable only at the election of the corporation.³¹ So, the trustees of a corporation may employ any of their number to perform proper and necessary services for the corporation, outside the duties of his office, and may

²⁴ *Barr v. New York &c. R. Co.*, 125 N. Y. 275; *Fudickar v. East Riverside Irrig. Dist.*, 109 Cal. 29; s. c. 41 Pac. Rep. 1024; *Kellerman v. Maier*, 116 Cal. 416; s. c. 48 Pac. Rep. 377; 6 Am. & Eng. Corp. Cas. (N. S.) 693; *Nye v. Storer*, 168 Mass. 53; s. c. 46 N. E. Rep. 402; 6 Am. & Eng. Corp. Cas. (N. S.) 247; *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. Rep. 86; s. c. 6 C. C. A. 260; *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830; *Wile &c. Co. v. Rochester &c. Land Co.*, 4 Misc. (N. Y.) 570; s. c. 25 N. Y. Supp. 794; *Foster v. Belcher's Sugar Ref. Co.*, 118 Mo. 238; s. c. 24 S. W. Rep. 63; *Louisville &c. Ref. Co. v. Carson*, 51 Ill. App. 552; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97; s. c. 44 N. E. Rep. 112; 4 Am. & Eng. Corp. Cas. (N. S.) 211; *Armstrong v. Cache Valley Land &c. Co.*, 14 Utah, 450; s. c. 48 Pac. Rep. 690; *Matson v. Alley*, 41 Ill. App. 72; s. c. aff'd, on other grounds, 31 N. E. Rep. 419; *Strobel v. Brownell*, 16 Misc. (N. Y.) 657; s. c. 40 N. Y. Supp. 702; *Kearns v. New York &c. Ferry Co.*, 17 Misc. (N. Y.) 272; s. c. 40 N. Y. Supp. 366; 12 Nat. Corp. Rep. 609; s. c. aff'd, 19 Misc. (N. Y.) 19; 13 Nat. Corp. Rep. 57. An agent

of a corporation may deal with it fairly, of course, when it is represented in the transaction by other agents: *Matson v. Alley*, 41 Ill. App. 72; s. c. aff'd on other grounds in 31 N. E. Rep. 419.

²⁵ *Louisville &c. R. Co. v. Carson*, 51 Ill. App. 552.

²⁶ *Nye v. Storer*, 168 Mass. 53; s. c. 46 N. E. Rep. 402; 6 Am. & Eng. Corp. Cas. (N. S.) 247; *Steinway v. Steinway*, 2 App. Div. (N. Y.) 301; s. c. 37 N. Y. Supp. 742; 73 N. Y. St. Rep. 418.

²⁷ 4 Thomp. Corp., § 5303.

²⁸ *Armstrong v. Cache Valley Land &c. Co.*, 14 Utah, 450; s. c. 48 Pac. Rep. 690.

²⁹ *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. Rep. 86; s. c. 6 C. C. A. 260; *Strobel v. Brownell*, 16 Misc. (N. Y.) 657; s. c. 40 N. Y. Supp. 702.

³⁰ *Foster v. Belcher's Sugar Ref. Co.*, 118 Mo. 238; s. c. 24 S. W. Rep. 63.

³¹ *Kearns v. New York &c. Ferry Co.*, 19 Misc. (N. Y.) 19; s. c. 42 N. Y. Supp. 771; 13 Nat. Corp. Rep. 57; aff'd 17 Misc. (N. Y.) 272; s. c. 12 Nat. Corp. Rep. 609; 40 N. Y. Supp. 366.

bind the corporation by an agreement in advance to pay him a reasonable compensation for such services.³² So, a corporation cannot defend an action brought by its president to recover the salary agreed to be paid him as president, on the ground that, as a member of the board of directors, he voted for the resolution fixing his salary, where his vote was not necessary to pass the resolution, and where the services were actually performed under the contract for six months with full knowledge of the corporation.³³ Such contracts are valid as to third parties who acquire rights under them;³⁴ nor can they be repudiated by the corporation after the rights of innocent third parties have supervened.³⁵ The right to avoid such a contract is ordinarily a right of the corporation, or of its stockholders where the corporation, through its governing body, refuses to act;³⁶ but it cannot be doubted that circumstances may arise where it will also be the right of its *creditors*, to be exercised through a receiver, assignee, or other trustee appointed to administer the corporate assets for their benefit.³⁷ Where the president of a corporation, authorized by the vote of its directors to make an assignment of its property for the benefit of its creditors, executed the assignment to himself as assignee, it was held that the assignment was voidable at the election of the corporation, but not on the application of *creditors* to remove him and appoint a suitable assignee in his stead.³⁸

§ 8501. Circumstances Under which Such Contracts Have Been Annulled.—It cannot even be said that a contract made between a corporation and one of its officers is presumptively or *prima facie* invalid; in other words, that it will be treated as invalid unless explained by the party claiming under it (the contracting officer or his privy) so as to make it appear that it was conformable with honest and fair dealing. The rule rather is that such contracts are

³² *Symmes v. Union Trust Co.*, 60 Fed. Rep. 830.

³³ *Kearns v. New York &c. Ferry Co.*, 17 Misc. (N. Y.) 272; s. c. 40 N. Y. Supp. 366; 12 Nat. Corp. Rep. 609; s. c. aff'd 13 Nat. Corp. Rep. 57; 19 Misc. (N. Y.) 19.

³⁴ *Wile &c. Co. v. Rochester &c. Land Co.*, 4 Misc. (N. Y.) 570; s. c. 25 N. Y. Supp. 794.

³⁵ *Wile &c. Co. v. Rochester &c. Land Co.*, *supra*.

³⁶ *Fudickar v. East Riverside Irrig.*

Dist., 109 Cal. 29; s. c. 41 Pac. Rep. 1024.

³⁷ "The vote cast by him did not render the proceedings void, but merely voidable at the instance of the corporation, its directors, stockholders, or creditors." *Van Wyck, O. J.*, in *Kearns v. New York &c. Ferry Co.*, 17 Misc. (N. Y.) 272, 273.

³⁸ *Rogers v. Pell*, 154 N. Y. 518; rev'g s. c. 89 Hun (N. Y.) 159; 69 N. Y. St. Rep. 213; 35 N. Y. Supp. 17.

voidable at the instance of the corporation, its stockholders or creditors when not inconsistent with honest and fair dealing, and that the burden is upon the party challenging such a contract to show that fact.³⁹ There is, at least in the view of some of the courts, an exception to the above statement of doctrine in cases where a single contracting officer has made a contract for the corporation with himself, or where a majority of the board of directors have made a contract for the corporation with themselves; since in these cases there are not, in substance and in sense, two contracting parties.⁴⁰ But, as was said by Judge Gray, speaking for the Court of Appeals of New York: "The rule does not operate to avoid *ab initio* all transactions of a trustee where he is interested, but is generally limited in its operation to rendering them voidable at the election of the party whose interests are concerned in the question of their affirmance or disaffirmance. If, therefore, nothing is done in avoidance, the transaction remains. If knowledge and opportunity concur whereupon to move, delay, if unreasonable or attended by retention and enjoyment of the results of the transaction, may be deemed equivalent to an adoption and ratification of that which before was the subject for action, in repudiation of any obligation."⁴¹ Such being the rule, we are more interested in considering the circumstances under which such contracts *have been avoided*. It has been held that an action for an accounting may be maintained in behalf of a corporation or its stockholders against its directors where, as such directors, they have taken a lease from themselves as officers of another corporation at an exorbitant rent, and have paid to themselves as individuals, from the treasury of the corporation, large sums for alleged loans or advances, the origin and nature of which they conceal from the stockholders.⁴² The Supreme Court of Missouri hold that where a quorum of the board of directors make, ostensibly for the corporation, a contract which is really for themselves, it will not be specifically enforced in equity, and this wholly without reference to the inquiry whether the contract was fair or unfair.⁴³ A Federal Court of Appeals has held

³⁹ This seems to be a reasonable deduction from *Genesee Valley &c. R. Co. v. Retsof Mining Co.*, 15 Misc. (N. Y.) 187.

⁴⁰ 3 Thomp. Corp., § 4060.

⁴¹ *Barr v. New York &c. R. Co.*, 125 N. Y. 263, 275.

⁴² *Sage v. Culver*, 147 N. Y. 241;

s. c. 41 N. E. Rep. 513; aff'g s. c. 71 Hun (N. Y.) 42; (where the case was presented by a demurrer to a petition in equity).

⁴³ *Hill v. Rich Hill Coal Min. Co.*, 119 Mo. 9; s. c. 24 S. W. Rep. 223; following *Munson v. Syracuse &c. R. Co.*, 103 N. Y. 58, 73.

that the president of a corporation cannot found a claim against the corporation based upon its promissory note issued in liquidation of his salary for five previous years, where his own vote was necessary to the passage of the resolution to pay such salary;⁴⁴ but the conclusion of the court was that the transaction was attended with fraud and bad faith, and this seems to have been a plain deduction from the evidence. In a recent case in Montana, a corporation was induced to buy a mine adjacent to its own mining property owned by its president as his "co-conspirator," owning or controlling two-thirds of the shares of the company, and the property of the corporation was mortgaged to secure the purchase money. The transaction was steeped in fraud, the details of which would be valueless here. The resolution to mortgage the property of the corporation had not been passed by the necessary vote of its stockholders. At the suit of minority stockholders, the transaction was annulled, and the court went so far as to hold that this ought to be done, although the president of the defrauded corporation could not be put *in statu quo*; nor was it necessary, under the facts of the case, for the plaintiffs, in order to maintain their suit, to allege and prove a request upon the directors to sue and their refusal to do so.⁴⁵ In a case in the Supreme Court of New York it was held that the transfer of the property of the corporation to one of its trustees, under a resolution passed and ratified by his own vote, is voidable at the instance of the corporation or its *creditors*.⁴⁶

§ 8502. **Contracts between Two Corporations Having Common Directors or Contracting Officers.**—The mere fact that some, or a majority of the directors or contracting officers of two corporations are common to both, does not make a contract between the two corporations absolutely void or incapable of ratification.⁴⁷ The most that can be said against such engagements is that, when challenged by a party entitled to call them in question, they will be

⁴⁴ *Doe v. Northwestern Coal &c. Co.*, 78 Fed. Rep. 62. That a director cannot cast a necessary vote for himself for an office, or to pay himself his salary as an officer,—see *Martin v. Santa Cruz Water Storage Co.*, (Ariz.) 36 Pac. Rep. 36.

⁴⁵ *Gerry v. Bismarck Bank*, 19 Mont. 191; s. c. 6 Am. & Eng. Corp. Cas. (N. S.) 453; 47 Pac. Rep. 810.

⁴⁶ *Gildersleeve v. Lester*, 68 Hun

(N. Y.) 532; s. c. 52 N. Y. St. Rep. 559; 22 N. Y. Supp. 1026.

⁴⁷ *San Diego &c. R. Co. v. Pacific Beach Co.*, 112 Cal. 53; s. c. 33 L. R. A. 788; 3 Am. & Eng. Corp. Cas. (N. S.) 580; 44 Pac. Rep. 333; *Hart v. Ogdensburg &c. R. Co.*, 89 Hun (N. Y.) 316; s. c. 70 N. Y. St. Rep. 226; 35 N. Y. Supp. 566; *Gasquet v. Fidelity Trust &c. Co.*, 75 Fed. Rep. 343; s. c. 41 U. S. App. 542.

subject to a severe judicial scrutiny, and will be set aside on the least appearance of unfairness. Such a transaction was accordingly set aside where the secretary of a corporation issued shares to himself and undertook to pay for them by a conveyance of the real property of another corporation of which he was an officer and director;⁴⁸ and in another case, where the circumstances were such that the transaction inured to the personal benefit of a majority of the directors.⁴⁹ On the other hand, if, upon such scrutiny, it appears that there is no abuse of the trust relations, the contract will stand.⁵⁰ But where *all* the directors in one corporation are directors in another, and assume to represent both in transactions in which their interests are opposed, the substantial elements of a contract are wanting, a breach of trust is obvious, since the same persons cannot serve two antagonistic masters. Such a transaction may, therefore, be avoided by either corporation, at the instance of a stockholder of either, without regard to the question whether it is detrimental to either, and no matter how open and seemingly fair the transaction may be.⁵¹ Certainly, there is room for the view that transactions between two corporations having common directors and officers, or between two corporations where there is in each board a majority of directors common to both corporations, ought to be held void whenever properly challenged while they remain *wholly executory*; the reason being that the essential elements of a contract, two parties having separate interests, are wanting, and that the conclusion that there are two parties is the result of a fiction, or refinement, or figment of the law. Judicial opinion seems, however, to favor the view that such contracts are not void unless shown to be unfair, though they will be subject to close scrutiny.⁵² It is said by the Supreme Court of Indiana that "while a contract between two corporations having common directors may be voidable, it is only so when the contract is in fraud of one of the corporations; and that it will never be set aside by the courts when the honesty of the transaction is manifest. For example, a note made by one corporation in favor of another is not invalid merely because the two corporations have common

⁴⁸ Bear River Valley Orchard Co. v. Hanley, 15 Utah, 506; s. c. 50 Pac. Rep. 611.

⁴⁹ Hutchinson v. Sutton Man. Co., 57 Fed. Rep. 998.

⁵⁰ Pauly v. Pauly, 107 Cal. 8; s. c. 48 Am. St. Rep. 98.

⁵¹ O'Conner Mining Co. v. Coosa Furnace Co., 95 Ala. 614; s. c. 36 Am. St. Rep. 251, and note. And see extended note to Beach v. Miller, 17 Am. St. Rep. 302, 303.

⁵² Schumacher v. Edward P. Allis Co., 70 Ill. App. 553.

directors, where it represents a debt justly owing from the maker to the payee.⁵³ For stronger reasons, a contract between corporations organized to distribute and furnish water to consumers in a county and city, for co-operation in supplying water to the city, is not *ultra vires* because *one* officer of each corporation is appointed a trustee, and they together are given general charge of the operation of the works and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties which are merely executory and such as could not be discharged by any board of directors otherwise than through an agent.⁵⁴

§ 8503. **Right of Directors to Purchase for Themselves at Judicial Sales of the Corporate Property.**—Recent cases are conflicting upon this question. One of the courts of Common Pleas of Pennsylvania has seemingly well held that a director of a corporation occupies such a fiduciary relation towards it and its stockholders, as forbids him to acquire title to the corporate property as against them by purchase at judicial sale.⁵⁵ This is the view of the Supreme Court of Ontario.⁵⁶ This view seems to have been conceded by the Canadian Courts, which, however, held that it did not apply after the company had gone into liquidation, for then the fiduciary relation of the directors to the company ceased.⁵⁷ The Supreme Court of Nebraska hold that an officer of a corporation organized for pecuniary profit, who, in good faith, purchased at a judicial sale the property of the corporation, will be protected in his purchase, provided he shows affirmatively that he has paid the full value of the property.⁵⁸ In the view of a court of Common Pleas of Pennsylvania, a director purchasing the property of the corporation at a judicial sale, when chargeable only with constructive, and not with actual fraud, is entitled to *reimbursement* for his outlays in the purchase, and will not be compelled to sur-

⁵³ *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 249; 42 N. E. Rep. 1097.

⁵⁴ *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; s. c. 41 Pac. Rep. 495; 29 L. R. A. 839.

⁵⁵ *Sebring v. Joanna Heights Asso.*, 2 Pa. Dist. Rep. 629.

⁵⁶ *Re Iron Clay Brick Man. Co.*, 19 Ont. 113, 120.

⁵⁷ *Re Mabou Coal &c. Co.*, 27 N. S. 305; following *Re Alexandria Hall Co.*, Weekl. Notes (Eng.), 1867, p. 67. So held in *Chatham Nat. Bank v. McKeen*, 24 Can. S. C. 348.

⁵⁸ *Horbach v. Marsh*, 37 Neb. 22; s. c. 55 N. W. Rep. 286.

render title or possession of the property except upon repayment.⁵⁹ It is needless to suggest that such a sale will not be set aside at the suit of the corporation after acquiescence and recognition.⁶⁰ The Supreme Court of Utah have soundly held that the president of a corporation cannot bind it by consenting to a sale of its property to a third person, to be held for himself. He will not be thus allowed to take a position in conflict with his duty;⁶¹ and this is the true doctrine with reference to this question. But circumstances may exist where the purchase by a director of the property of the corporation at a foreclosure sale will be upheld as an act done in perfect good faith.⁶²

§ 8504. **Paying or Securing Their Individual Debts with Corporate Property or Credit.**—For the directors or contracting officers of a corporation to divert its property, or pledge its credit to the payment or securing of their individual debts, is a fraud and breach of trust towards the corporation and its stockholders,⁶³ and a fraud as to its creditors.⁶⁴ Such transactions will be annulled in any appropriate proceeding, without regard to the form which they may have taken,—saving, of course, the rights of innocent third persons.⁶⁵ The principle extends so far as to prevent an officer of a corporation from paying a debt owing him by the corporation out of property indorsed to him by the directors for any purpose.⁶⁶ Nor does it make any difference that the debt for

⁵⁹ Sebring v. Joanna Heights Asso., 2 Pa. Dist. Rep. 629.

⁶⁰ Rutgers Female College v. Tallman, 24 N. Y. Supp. 771.

⁶¹ Victor Gold & Co. Min. Co. v. National Bank, 15 Utah, 391; s. c. 49 Pac. Rep. 826.

⁶² Osborne v. Monks, 14 Ky. L. Rep. 606; s. c. 21 S. W. Rep. 101.

⁶³ Greenville Gas Co. v. Reis, 54 Oh. St. 549; s. c. 35 Oh. L. J. 364; 44 N. E. Rep. 271; Main Jellico Mountain Coal Co. v. Lotspeich, 14 Ky. L. Rep. 595; s. c. 20 S. W. Rep. 377; Germania Safety Vault & Co., 71 Fed. Rep. 797; s. c. 37 U. S. App. 602; Close v. Potter, 5 Misc. (N. Y.) 543; s. c. 25 N. Y. Supp. 972.

⁶⁴ National Tube Works Co. v. Ring Refrigerating & Co., 118 Mo. 365; s. c. 22 S. W. Rep. 947; Greenville Gas Co. v. Reis, 54 Ohio St. 549; s. c. 35 Ohio L. J. 364; 44 N. E. Rep. 271;

Nevitt v. First Nat. Bank, 91 Hun (N. Y.) 43; s. c. 36 N. Y. Supp. 294; 71 N. Y. St. Rep. 376.

⁶⁵ Circumstances under which the taker of the bond of a corporation issued to secure the individual debts of its officers was not deemed an innocent purchaser: Germania Safety Vault & Co. v. Boynton, 71 Fed. Rep. 797; s. c. 37 U. S. App. 602.

⁶⁶ Thus, where the directors indorsed to the president a *bond* of the corporation to sell for its benefit, and he converted it to his own use, in payment of a debt due him from the corporation,—a suit in equity by a stockholder was sustained to compel him, and a purchaser of it with notice, to surrender it for cancellation: Greenville Gas Co. v. Reis, 54 Ohio St. 549; s. c. 35 Ohio L. J. 364; 44 N. E. Rep. 271.

which the money which was thus raised by the officer was due by him to the corporation, since it is equally the payment of his own debt out of the corporate funds.⁶⁷ Such a misappropriation of the corporate funds stands, as regards its creditors, on the footing of a fraudulent conveyance, and is subject to the rule that if a part of the consideration of the transaction was fraudulent and corrupt, the whole will be treated as void.⁶⁸ But it seems that such a contract ought to be enforced against the corporation in so far as the corporation has received the benefit of it.⁶⁹ Nor is it any excuse for such a diversion of corporate assets that the purpose of the transaction was to keep alive and going a firm composed of members of the corporation, and that it was to the advantage of the corporation to have the firm remain in existence.⁷⁰ A Federal Court of Appeals has gone so far as to hold that such a giving away of the corporate assets is *ultra vires* in the sense of being unlawful as against the public, so that it is *incapable of ratification* by the acquiescence of the stockholders.⁷¹ This, it will be perceived, is the English doctrine of *ultra vires*, inherited from the rule adopted when nearly all corporations were public corporations, and afterwards extended to mere trading companies. Though it lingers in Massachusetts and possibly in some other States, and in the Supreme Court of the United States when Mr. Justice Gray writes the opinion, it may be called the *vanishing doctrine of ultra vires*. The sound view is that such transactions are unlawful as against the corporation, as against its stockholders, and as against its creditors; that they are consequently capable of

⁶⁷ Thus, a mortgage given by a corporation, to secure money borrowed by one of its officers to pay a debt due it from him, is fraudulent as to its creditors, although such money was actually paid to the corporation: *National Tube Works Co. v. Ring Refrigerating &c. Co.*, 118 Mo. 365; s. c. 22 S. W. Rep. 947.

⁶⁸ Thus, if a part of an indebtedness secured by the mortgage of a corporation is the individual indebtedness of one of its officers, the entire mortgage is fraudulent as between the corporation and its creditors: *National Tube Works Co. v. Ring Refrigerating &c. Co.*, 118 Mo. 365; s. c. 22 S. W. Rep. 947.

⁶⁹ Thus, where a stockholder caused a note of the corporation secured by a

mortgage of its property, to be executed in part security for his own debt and in part for a debt due from the corporation, it was held the mortgage should stand as an equitable charge against the corporation to the extent of its own debt: *Hatch v. Johnson Loan &c. Co.*, 79 Fed. Rep. 828. That a corporation, in an accounting with a bank, is not entitled to credit for an amount deposited in such a bank by an officer and director who owed the bank more than the amount of the deposit,—see *Hatch v. Johnson Loan &c. Co.*, *supra*.

⁷⁰ *Germania Safety Vault &c. Co. v. Boynton*, 71 Fed. Rep. 797; s. c. 37 U. S. App. 602.

⁷¹ *Germania Safety Vault &c. Co. v. Boynton*, *supra*.

being affirmed by either of these bodies; and that, except for the purpose of conserving the rights of existing or future creditors by preserving intact the central fund or stake upon which the corporation secures credit, and which the law requires it to raise and put in the place of the personal credit of its members,—the State has no interest in its preservation any more than it has in the preservation of the assets of a trading partnership. It may be said, on the other hand, that the public policy which requires the assets of a business corporation to be honestly filled up, equally requires it to be honestly preserved as a *trust fund* for creditors,—the fund which the law allows the adventurers to substitute for their individual credit—the only security of the public. If the view of the last case is sound, the directors cannot authorize such a transaction, since they cannot ratify it. For stronger reasons, it follows that a transaction by which the assets of a corporation are appropriated to the purposes of a single director is invalid, when his own vote in the directorate is necessary to carry a resolution to authorize or ratify it.⁷²

§ 8505. **View that Directors and Officers are Quasi Trustees for Individual Shareholders.**—The president of a corporation to whom stockholders intrust their shares for sale, occupies such a relation of trust to them that he is bound to account to them for any secret profits which he makes in the transaction.⁷³

§ 8506. **Directors Chargeable with Knowledge of Condition of Corporation.**—Directors of a corporation, assenting to or authorizing the execution of a mortgage upon its assets, are chargeable with knowledge of its condition in respect to solvency or insolvency.⁷⁴

§ 8507. **Chargeable with Notice of Action of Board.**—A director of a corporation, dealing with its property on his own account, is chargeable with notice of the action of the board of directors as to such property, whether he was present or not at the meeting which took the action.⁷⁵

⁷² Gildersleeve v. Lester, 68 Hun, 100; Twinlick Oil Co. v. Marbury, 91 (N. Y.) 532; s. c. 52 N. Y. St. Rep. 559; 22 N. Y. Supp. 1026. U. S. 587; s. c. 23 L. ed. 329.

⁷³ Mulvane v. O'Brien, 58 Kan. 463; s. c. 49 Pac. Rep. 607; 15 Nat. Corn. Rep. 4; 7 Am. & Eng. Corp. Cas. (N. S.) 139; citing Perry v. Pearson, 135 Ill. 218; Forbes v. McDonald, 54 Cal. Rep. 968.

⁷⁴ Lowry Bkg. Co. v. Empire Lumber Co., 91 Ga. 624; s. c. 17 S. E. Rep. 968. ⁷⁵ Greenville Gas Co. v. Reis, 54 Ohio St. 549; s. c. 44 N. E. Rep. 271.

§ 8508. When Fiduciary Relations of Directors Terminate.—

Upon the appointment of a liquidator to wind up a corporation under a statute,⁷⁶ all fiduciary relations of the directors to the company or to its shareholders end, unless continued in force under statutory authority.⁷⁷

§ 8509. No Right of Lien on Lands Purchased by Railway Directors for Speculative Purposes along Right of Way.—Lands purchased by officers and directors of a railroad company along its right of way, for the purpose of having depots established thereon or for town sites, will not be held impressed with a trust in favor of purchasers of the road at foreclosure sale, when not shown to have been paid for with the money or credits of the company, or to have been acquired as donations to it.⁷⁸

⁷⁶ *Can. Rev. Stat.*, ch. 129.

⁷⁸ *Olcott v. Rice*, 69 *Fed. Rep.* 199;

⁷⁷ *Chatham Nat. Bank v. McKeen*, s. c. 16 *O. C. A.* 186; 30 *U. S. App.*

24 *Can. S. C.* 348; *Re Mabou Coal Co.*, 461.

²⁷ *N. S.* 305.

CHAPTER CCXXII.

LIABILITY OF DIRECTORS OUTSIDE OF STATUTES.

SECTION	SECTION
8512. Not liable for honest mistake as to the extent of their powers.	8517. Not liable to creditors for mere mismanagement, etc.
8513. Innocent directors not liable for the misprisions of the others.	8518. Liable to third persons for frauds.
8514. Not liable to the company for damages for publishing false balance sheets.	8519. Not individually liable because contracts informally made.
8515. Liable to shareholders for individual wrongs done them.	8520. Liable for debts contracted before organization completed.
8516. Not liable to shareholders for failing to declare a dividend.	8521. Directors of foreign corporation not individually liable for its debts.

§ 8512. **Not Liable for Honest Mistake as to the Extent of Their Powers.**— As a general rule, directors are not liable for honest mistakes as to the extent of their powers.¹ If, for example, they pay out funds of the company, honestly and reasonably, believing in a state of facts which would justify the payment, they are not bound to replace the funds because it subsequently turns out that, on the true facts, the payment was *ultra vires*.² The directors of a corporation organized to manufacture *woodenware* are not personally liable for losses sustained by their adding to its business the manufacture of *sewing machines*, where they act in good faith for what they consider the best interests of the corporation, and the stockholders acquiesce in their action for years.³ Carrying out the same idea, it is held that the right of action given by a statute of New York,⁴ for “official misconduct,” cannot be predicated upon a mere misconception of his rights by a trustee, or upon improper or unlawful action, or upon what may be called

¹ *Seymour v. Spring Forest Cemetery Asso.*, 4 App. Div. (N. Y.) 359, 376; s. c. 38 N. Y. Supp. 726; 3 Thomp. Corp., § 4109.

² *Re Kingston Cotton Mill Co.*, (1896) 1 Ch. 331; s. c. 65 L. J. Ch.

(N. S.) 290; 73 Law T. Rep. 745; rev'd in (C. A.) (1896) 2 Ch. 279.

³ *Bond v. Poe*, 12 Ohio C. C. 281.

⁴ New York Code of Civ. Proc., § 1781.

misprisions; but that *malfeasance* is necessary, which means action taken with a *corrupt intent*.⁵

§ 8513. **Innocent Directors not Liable for the Misprisions of the Others.**— Innocent directors are not liable for the misprisions of their co-directors.⁶ The difficulty in applying this rule is to determine under what circumstances a director is innocent, and under what he ought to be regarded as assenting to what the others do. On this subject it has been held that, although the mere presence of a director at a meeting at which the minutes of the previous meeting are affirmed, is not sufficient of itself to make him personally liable for an *ultra vires* investment ordered at the previous meeting,—yet where he presided as chairman at the former meeting at which the minutes of the previous meeting were approved, and made a statement indicating that he took an active part in the transaction. he was personally responsible.⁷

§ 8514. **Not Liable to the Company for Damages for Publishing False Balance Sheets.**— Without special reference to any statute, it has been held in England that neither the directors nor auditors of a manufacturing company publishing balance sheets of its business, which overvalue its property and stock in trade, are liable for *damages* resulting from the company continuing its business under the supposition that such balance sheets were correct, the same being *too remote*; although those who know that there is an overvaluation are liable for *dividends* improperly declared.⁸

§ 8515. **Liable to Shareholders for Individual Wrongs Done Them.**— If a shareholder pledges his shares as collateral security for a debt owing by him to a director, and thereafter the directors enter into a conspiracy to depreciate the price of the shares by using their power as directors, so as to be able to buy them in for less than their value, this is an individual wrong to the stockholder, and not merely a wrong to the corporation; and the stockholder is entitled to have the wrong redressed in a proper action.⁹

⁵ *Stokes v. Stokes*, 23 App. Div. (N. Y.) 552; s. c. 48 N. Y. Supp. 722. ⁸ *Re Kingston Cotton Mill Co.*, (1896) 1 Ch. 331; s. c. 65 L. J. Ch. (N. S.) 290; 73 Law T. Rep. 745; rev'd

⁶ *Fox v. Hale & Co.*, 108 Cal. 369; s. c. 1 Am. & Eng. Corp. Cas. (N. S.) 233; 41 Pac. Rep. 308. in (C. A.) (1896) 2 Ch. 279.

⁷ *Re Lands Allotment Co.*, (C. A.) 522; s. c. 25 C. C. A. 50; 47 U. S. App. 470; citing *Vose v. Grant*, 15

§ 8516. **Not Liable to Shareholder for Failing to Declare a Dividend.**— In the absence of fraud, directors are not liable to stockholders for failing to declare a dividend, this being a matter committed to their discretion, which, when honestly and intelligently exercised, will not be supervised by the courts.¹⁰

§ 8517. **Not Liable to Creditors for Mere Mismanagement, etc.**— Directors are not liable *to creditors* of the corporation for mere mismanagement, unless made so by statute. Such a misprision falls under the footing of *non-feasance*, and the liability, if any, is to the corporation, to its stockholders, or to its representative after insolvency. Therefore, a recovery cannot be had for service rendered to a corporation, against its directors, who are sued on the ground that the contract for service was their personal obligation, if they act for the corporation in making the contract, although they have mismanaged and squandered the corporate property so as to prevent it from discharging its obligations.¹¹

§ 8518. **Liable to Third Persons for Frauds.**— Directors are liable to the corporation, or to its representatives after its insolvency, and, under exceptional facts or theories, to third persons, for frauds and breaches of trust whereby the assets of the corporation are diminished; though they often escape liability through a seeming disposition on the part of judges to condone their frauds.¹² Thus, if one who occupies the office of director and treasurer withdraws the funds of the corporation from its legitimate purposes and uses them for the purchase of shares of the corporation for himself and other stockholders, he will be bound to replace all the funds so withdrawn, notwithstanding the fact that what he did may have been approved by all the stockholders and directors. The reason is that the capital stock of a corporation is a *trust fund* for its creditors, and that “cred-

Mass. 505, 519; *Spear v. Grant*, 16 Mass. 9; *Bartholomew v. Bentley*, 15 Ohio, 659; *Harman v. Tappenden*, 1 East, 555; *Walsham v. Stainton*, 1 De Gex, J. & S. 678.

¹⁰ *Excelsior & Co. v. Pierce*, 90 Cal. 131; *Zellerbach v. Allenberg*, 99 Cal. 57; s. c. 33 Pac. Rep. 786.

¹¹ *Kelley v. Collier*, 11 Tex. Civ. App. 353; s. c. 32 S. W. Rep. 428.

¹² The decision of *Romer, J.*, in *Elk-*

ington v. Huerter, (1892) 2 Ch. 452, is submitted as a vindication of this statement. So is *Plattsburgh First Nat. Bank v. Sowles*, 46 Fed. Rep. 731; s. c. 10 Ry. & Corp. L. J. 278; 5 Bkg. L. J. 206. Bank directors not liable for erroneous representations as to solvency of bank, made in good faith; *Foster v. Gibson*, 18 Ky. L. Rep. 716; s. c. 38 S. W. Rep. 144.

itors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds."¹³ If the directors of a corporation personally enter into a contract with third persons for the rendering of services to the corporation for which the third persons are to receive compensation in shares of the corporation, and the directors afterwards render the shares worthless by placing a mortgage upon the property of the corporation and causing it to be sold out thereunder,—they will be personally liable to the other contracting parties for the depreciation of the shares thereby produced.¹⁴

§ 8519. **Not Individually Liable because Contracts Informally Made.**—A somewhat "loose, defective, and irregular" judicial opinion has produced this syllabus in the Lawyer's Reports Annotated: "The loose, defective, or irregular way in which the business of a corporation is conducted by its managers, who engage the corporation in more or less independent enterprises without much, if any, regard to its charter powers, and without going through the form of putting their acts in official guise, or seeking corporate sanction,—will not make the contracts which are made in the corporate business their individual agreements."¹⁵

§ 8520. **Liable for Debts Contracted Before Organization Completed.**—Men who contract debts, professing to act in behalf of a corporation which does not exist, or the organization of which is not advanced to the stage of a *de facto* corporation, are liable personally for those debts, on the theory of breach of warranty of agency, or on whatever other theory you like;¹⁶ and there are statutes in affirmation of this rule.¹⁷

¹³ Re Brockway Man. Co., 89 Me. 121; s. c. 35 Atl. Rep. 1012; 5 Am. & Eng. Corp. Cas. (N. S.) 20.

¹⁴ Kelly v. Collier, 11 Tex. Civ. App. 353; s. c. 32 S. W. Rep. 428.

¹⁵ Linkauf v. Lombard, 20 L. R. A. 48; s. c. 137 N. Y. 417; s. c. 51 N. Y. St. Rep. 63; 33 N. E. Rep. 472.

¹⁶ Forbes v. Whittemore, 67 Ark. 229; s. c. 35 S. W. Rep. 223.

¹⁷ Loverin v. McLaughlin, 161 Ill. 417; s. c. 12 Nat. Corp. Rep. 326; 44 N. E. Rep. 99; aff'g s. c. 46 Ill. App. 373; Greene v. Masten, 66 Ill. App. 345. Under Ill. Act of 1874, ch. 32, §§ 4, 18, the directors of a

corporation are liable to pay the debts contracted in behalf of the corporation where they assume to exercise corporate power without complying with the provisions of the statute as to the mode of organizing the corporation, or do so before all stock named is subscribed; and either of the delinquencies will make them liable. Loverin v. McLaughlin, 161 Ill. 417; s. c. 12 Nat. Corp. Rep. 326; 44 N. E. Rep. 99; aff'g s. c. 46 Ill. App. 373. See also Rutherford v. Hill, 22 Or. 218; s. c. 17 L. R. A. 549, and an extensive note.

§ 8521. **Directors of Foreign Corporation not Individually Liable for Its Debts.**—Unless the local statute law makes a different rule, the directors of a foreign corporation doing business within the domestic State, are clothed with the same immunity from personal liability for its debts, as attends them in the State of the creation of the corporation; and this, although the domestic statutes do not give express permission for the foreign corporation to do business within the domestic State, since that permission is given by State comity. Nor does it make any difference that the directors sought to be made liable, reside in the domestic State, or that the foreign corporation may have migrated, so to speak, and settled there for the purposes of its business.¹⁸

¹⁸ *Boyington v. Van Etten*, 62 Ark. 63; 8. c. 35 S. W. Rep. 622; 4 Am. & Eng. Corp. Cas. (N. S.) 522.

CHAPTER CCXXIII.

STATUTORY LIABILITY OF DIRECTORS.

SECTION	SECTION
8524. Statutory liability for failing to publish verified reports of condition of corporation.	8532. Other points in the construction of these statutes.
8525. On principle, such statutes not penal.	8533. Liability for contracting corporate debts before capital stock paid in.
8526. For what debts the directors are liable under these statutes.	8534. Liability for creating or assenting to excessive debts.
8527. For what debts directors are not liable under these statutes.	8535. Liability for declaring and paying unlawful dividends.
8528. What will not excuse non-compliance with such statutes.	8536. Directors not liable to corporation for transactions whereof it has elected to receive the benefit.
8529. Verification of the report.	8537. Acquiescence of shareholders.
8530. This liability enforceable by action at law by each creditor for himself.	8538. Personal liability of trustees of corporations created for purposes other than for profit.
8531. Right to proceed against directors under these statutes is assignable.	

§ 8524. **Statutory Liability for Failing to Publish Verified Report of Condition of Corporation.**— In a former volume of this work, the author considered at length a class of statutes existing in some of the States, making directors liable for the debts of the corporation for failing to publish, at stated periods, verified reports of the financial condition of the corporation.¹ An example of such a statute is found in California, requiring the directors of mining corporations to *post*, on the first Monday of each month, *an itemized account* of the receipts and disbursements for the preceding month. A balance sheet so posted, intended in good faith to be a compliance with this statute, is not insufficient merely because, on its face, it purports to be for forty days instead of the preceding month merely.³

¹ 4 Thomp. Corp., § 4163, *et seq.*

² Cal. Act, Apr. 23, 1880.

³ Shanklin v. Gray, 111 Cal. 88; s. c. 43 Pac. Rep. 399.

§ 8525. **On Principle, Such Statutes not Penal.**—It is not a sound view that such statutes are penal, though there are many decisions so holding.⁴ The true view is that the legislature grants to the members of corporations an immunity from a personal liability for the debts created in their behalf, on condition that they will create a sufficient joint stock or joint fund to stand in the place of their personal liability, and that they will keep the public advised by stated reports, of the condition of that fund; and the legislature simply withholds the immunity from the *managing members* unless this latter condition is complied with. It does not take away from them any right conferred upon them either by the common or statute law, but simply withholds from them a franchise or privilege which is contrary to common right—the privilege of not being personally answerable for their own debts—unless they will comply with a condition subsequent which is easy of compliance. It is simply a case where the grant of a franchise is made with a qualification, and where the qualification hence reads itself into the grant.⁵

§ 8526. **For what Debts the Directors are Liable under These Statutes.**—Without attempting to differentiate the decisions, but merely for the purpose of indicating them, it may be said that it has been held that the directors of corporations, failing to file the reports required by such statutes, become liable for unliquidated demands against the corporation, not reduced to judgment;⁶ for debts evidenced by notes which have been transferred to the plaintiff since the dissolution of the corporation;⁷ for a bond of the corporation secured by its mortgage deed of trust;⁸ under the

⁴ 3 Thomp. Corp., §§ 4164, 4165.

⁵ In a recent Federal case Mr. U. S. District Judge Lochren took substantially this view of such a statute: *Fitzgerald v. Weidenbeck*, 76 Fed. Rep. 695.

⁶ *Green v. Easton*, 74 Hun (N. Y.) 329; s. c. 55 N. Y. St. Rep. 895; 26 N. Y. Supp. 553; *Manhattan Co. v. Kaldenberg*, 27 App. Div. (N. Y.) 31; s. c. 50 N. Y. Supp. 265; *Camp Man. Co. v. Reamer*, 14 App. Div. (N. Y.) 408; s. c. 43 N. Y. Supp. 1027; rev'g 18 Misc. (N. Y.) 619, 722; s. c. 26 Civ. Pro. (N. Y.) 100, 103; 43 N. Y. Supp. 673, 674; *Donnelly v. Pancoast*, 15 App. Div. (N. Y.) 323; s. c. 44 N. Y. Supp. 104; *Milsom Rendering & Co. Co.*

v. Baker, 16 App. Div. (N. Y.) 581; s. c. 44 N. Y. Supp. 999; s. c. aff'd, 153 N. Y. 687; *Rose v. Chadwick*, 9 App. Div. (N. Y.) 311; s. c. 41 N. Y. Supp. 190. On the other hand, a judgment against the corporation is not enough, but the creditor must also show that it was for a debt for which the statute makes the director liable: *Wetter v. Lewis*, 22 Misc. (N. Y.) 12; s. c. 48 N. Y. Supp. 617; *Collins v. Hydron*, 125 N. Y. 320.

⁷ *Bedford v. Sherman*, 68 Hun (N. Y.) 317; 52 N. Y. St. Rep. 98; 22 N. Y. Supp. 892.

⁸ *Morgan v. Hedstrom*, 25 App. Div. (N. Y.) 547; s. c. 49 N. Y. Supp. 1049.

Colorado statute, for the unpaid debts of the preceding year;⁹ under the Pennsylvania statute, for all debts contracted during the period of neglect to comply with the requirements of the statute;¹⁰ for the fraudulent removal of grain stored in an elevator represented by an outstanding warehouse receipt;¹¹ for a judgment for *costs* in an unsuccessful action by the corporation for a tort.¹²

§ 8527. **For what Debts Directors are not Liable under These Statutes.**—Directors are not liable under the Montana statute for debts of the corporation incurred before their failure to file the prescribed reports;¹³ nor at all, for a contingent liability accruing to a corporation for a breach of its covenant of warranty in its deed of conveyance;¹⁴ nor for the *costs* incurred by a creditor in reducing his claim to judgment against the corporation;¹⁵ nor for a debt the incurring of which was not previously authorized by the defendants in their capacity as trustees.¹⁶

§ 8529. **What will not Excuse Non-Compliance with Such Statutes.**—A belief on the part of the directors that the corporation is solvent is not an excuse for their failure to make a statement of its affairs required by such a statute, especially where their prede-

⁹ And the director is not relieved from liability for the balance of such a debt by the payment by the corporation, after he becomes director, of an amount greater than such balance: *Fairbank & Co. v. Macleod*, 8 Colo. App. 190; s. c. 45 Pac. Rep. 282.

¹⁰ *Kurtz v. Wigton*, 34 W. N. C. (Pa.) 219.

¹¹ *Bedford v. Sherman*, 68 Hun (N. Y.) 317; s. c. 52 N. Y. St. Rep. 98; 22 N. Y. Supp. 892. Other decisions under similar statutes as to the debts of the corporation for which directors become liable by reason of failing to file statutory reports of the condition of the corporation: *Huntington v. Attrill*, 118 N. Y. 365; *Austin v. Berlin*, 13 Colo. 198; *Ferguson v. Gill*, 64 Hun (N. Y.) 284; *Torbett v. Godwin*, 62 Hun (N. Y.) 407; *Young v. Godwin*, 46 N. Y. St. Rep. 934; *Woods v. Godwin*, 46 N. Y. St. Rep. 937; *Ashley v. Godwin*, 46 N. Y. St. Rep. 936; *Whitney v. Cammann*, 45 N. Y. St. Rep. 570; *Allen v. Clark*, 49 N. Y. St. Rep. 175; *Kurtz v. Wigton*, 34 W. N. C. (Pa.) 219.

¹² *Allen v. Clark*, 49 N. Y. St. Rep. 175; s. c. 21 N. Y. Supp. 338; aff'd, 141 N. Y. 584; s. c. 57 N. Y. St. Rep. 868. Compare *Green v. Easton*, 74 Hun (N. Y.) 329; s. c. 55 N. Y. St. Rep. 895; 26 N. Y. Supp. 553. That an obligation incurred by a corporation organized under Pa. Act July 18, 1863, through the issuance of a forged paper by the treasurer is a "debt" for which directors who have failed to file a certificate, as required by section 33, are liable under section 34, where the money has been received by the corporation: *Kurtz v. Wigton*, 34 W. N. C. (Pa.) 219.

¹³ *Giddings v. Holter*, 19 Mont. 263; s. c. 48 Pac. Rep. 8.

¹⁴ *Giddings v. Holter*, 19 Mont. 263; s. c. 48 Pac. Rep. 8.

¹⁵ *Green v. Easton*, 74 Hun (N. Y.) 329; s. c. 55 N. Y. St. Rep. 895; 26 N. Y. Supp. 553. Compare *Allen v. Clark*, 141 N. Y. 584; s. c. 57 N. Y. St. Rep. 868.

¹⁶ *Wetter v. Lewis*, 22 Misc. (N. Y.) 12; s. c. 48 N. Y. Supp. 617.

cessors in office have failed to make such statement.¹⁷ The trustees of a corporation will not be relieved from the duty of filing the annual report required by such a statute, by the mere fact that an application by two, opposed by the other two, of the four trustees for a dissolution of the corporation, has been made to the attorney-general, where it is not in the hands of a receiver, and there is no proof that it is insolvent or unable to resume its business, or that it has abandoned its franchises.¹⁸

§ 8529. Verification of the Report.— If the statute requires such a report to be verified by a certain officer or officers of the corporation, it is plain that this cannot be dispensed with, because that would be an easy way to fritter away the protection which the statute was designed to afford the public.¹⁹ Where such a statute required reports of the condition of the company to be posted, verified by the superintendent, and gave to a stockholder a penalty for non-compliance, an action might be maintained for the penalty although the report was in fact true.²⁰ Where the statute required the report to be verified by the oath of the president or vice-president and *secretary* or *treasurer*, the report was not a compliance with the statute, notwithstanding the fact that there had been a failure to elect a secretary and treasurer, and the directors were liable.²¹ Under a statute requiring such a report to be verified by the president “and treasurer or secretary,” a verification by the president alone, referring only to his office as president, is sufficient where he is at the time discharging the duties and functions of treasurer and secretary pursuant to its by-

¹⁷ Githers v. Clarke, 158 Pa. St. 616; s. c. 24 Pitts. L. J. (N. S.) 355; 33 W. N. C. (Pa.) 462; 28 Atl. Rep. 232.

¹⁸ First Nat. Bank v. Lamont, 130 N. Y. 366; s. c. 41 N. Y. St. Rep. 684; 29 N. E. Rep. 321.

¹⁹ Colorado Fuel & Co. v. Lenhart, 6 Colo. App. 511; s. c. 41 Pac. Rep. 834.

²⁰ Shanklin v. Gray, 111 Cal. 88; s. c. 43 Pac. Rep. 399.

²¹ Manhattan Co. v. Kaldenberg, 27 App. Div. (N. Y.) 31; s. c. 50 N. Y. Supp. 265. The New York statute is not complied with by a verification by one who holds both the offices of president and treasurer, where the verification on its face purports to be only the act of the president; and this al-

though a secretary has been elected who refuses to act: Shultz v. Chatfield, 17 Misc. (N. Y.) 264; s. c. 40 N. Y. Supp. 1081. *Contra*, that such a report is not insufficient because not verified by the secretary and treasurer, where the secretary and treasurer has resigned before the time for making such report, and the office is not filled until after the time of making it elapses: International Bank v. Faber, 79 Fed. Rep. 919. Nor is such a report defective because the jurat is not signed by the president, where the report itself is so signed and the jurat shows that the report was verified by the oath of the president: International Bank v. Faber, 79 Fed. Rep. 919.

laws, in place of the regular treasurer and secretary who has resigned.²²

§ 8530. This Liability Enforceable by Action at Law by Each Creditor for Himself.—The liability denounced by these statutes to pay the debts of the corporation is a liability accruing to each creditor of the corporation separately, whose debt is within the protection of the statute, and, unless the statute otherwise provides, is enforceable by each creditor suing for himself in an action at law.²³

§ 8531. Right to Proceed Against the Directors under these Statutes is Assignable.—As this right to collect from the directors the debts of the corporation for each failure to publish the statutory report of the condition of the corporation, is not a penalty, it is capable of being *assigned* with the debt of the corporation.²⁴

§ 8532. Other Points in the Construction of These Statutes.—A person cannot act as a director and avoid the liability imposed by these statutes. The liability attaches to *de facto* directors, as well as to directors *de jure*. Directors holding over after the expiration of the terms for which they were elected in default of the corporation holding its annual election, who fail to make the report required by such a statute, are liable for the debts of the corporation as therein prescribed.²⁵ This statutory obligation cannot be contracted away. A provision in a corporate bond that no stockholder shall be individually liable thereon, or in respect thereto, has no effect to relieve directors of the company from their statutory liability for its debts in case of their failure to file an annual report required by statute; and if such a provision were intended to provide against such liability, it would be void as against public policy.²⁶

²² Noble v. Euler, 20 App. Div. (N. Y.) 548; s. c. 47 N. Y. Supp. 302.

²³ Fitzgerald v. Weidenbeck, 76 Fed. Rep. 695; Lexow v. Pennsylvania Diamond Drill Co., 5 Pa. Dist. Rep. 491.

²⁴ Lexow v. Pennsylvania Diamond Drill Co., 5 Pa. Dist. Rep. 499; Allen v. Clark, 49 N. Y. St. Rep. 175; s. c. 21 N. Y. Supp. 338; aff'd, 141 N. Y. 584; s. c. 57 N. Y. St. Rep. 868.

²⁵ Jenet v. Nims, 7 Colo. App. 88;

s. c. 43 Pac. Rep. 147; 3 Am. & Eng. Corp. Cas. (N. S.) 130. Therefore, a director of a corporation cannot escape liability for failure to file its annual report on the ground that he holds less than five shares of stock, as required by N. Y. Laws 1892, ch. 688, § 20: Donnelly v. Pancoast, 15 App. Div. (N. Y.) 323; s. c. 44 N. Y. Supp. 104.

²⁶ Swancoat v. Remsen, 26 Civ. Pro. (N. Y.) 94; s. c. 78 Fed. Rep. 592.

§ 8533. **Liability for Contracting Corporate Debts before Capital Stock Paid in.**—Statutes have already been considered²⁷ which make directors personally liable for contracting debts on behalf of the corporation before the entire capital stock, or a prescribed percentage of it, has been paid in. A statute of this kind provided that the capital stock of companies organized thereunder should be paid in within eighteen months from the incorporation, and that if any company violated the provisions of the act and thereafter became insolvent, its directors, ordering or assenting to such violation, should be jointly and severally liable for all debts contracted after such violation. This statute was held to be *mandatory*, and in an action under it, it was no defense that the collection of payments for the stock was devolved upon the treasurer.²⁸

No recovery under such a statute to one who makes a loan to the corporation with knowledge that the director sought to be made liable has transferred his shares to another: *Sinclair v. Dwight*, 9 App. Div. (N. Y.) 297; s. c. 41 N. Y. Supp. 193. Pennsylvania statute of July 18, 1863, on this subject not abrogated by General Corporation Act of 1874: *Kurtz v. Wigton*, 34 W. N. C. (Pa.) 219. Compare *Green v. Whitehead*, 5 Pa. Dist. Rep. 613; *Wagner v. Corcoran*, 2 Pa. Dist. Rep. 440. Provision of New York statute of 1848, ch. 40, on this subject does not apply to corporations organized for the improvement of real estate for residences under New York Laws 1871, ch. 535: *McComb v. Belknap*, 30 Abb. N. Cas. (N. Y.) 119. The liability of directors of a corporation for failure to file an annual report imposed by N. Y. Laws 1892, ch. 2, was retained by N. Y. Laws 1892, ch. 688, providing for the continuance of all liability accruing under any law since the passage of N. Y. Laws 1890, ch. 564: *Bank of Metropolis v. Faber*, 1 App. Div. (N. Y.) 341; s. c. 37 N. Y. Supp. 423; 72 N. Y. St. Rep. 673; s. c. aff'd, 150 N. Y. 200. The omission from N. Y. Laws 1875, ch. 510, of the word "annually," contained in N. Y. Laws 1848, ch. 40, § 12, making trustees of corporations liable for corporate debts in case of their failure to file the statement therein mentioned, does not re-

lieve the trustees from such liability upon filing one annual statement, since the words "each year" in the amending act take the place of the word "annually;" *Allen v. Clark*, 49 N. Y. St. Rep. 175; s. c. 21 N. Y. Supp. 338; aff'd, 141 N. Y. 584; s. c. 57 N. Y. St. Rep. 868. A corporation organized to manufacture and sell trees, wood, timber, and lumber, to mine, ship, and sell ore, erect and maintain blast furnaces and other iron works, purchase and construct docks, and repair, maintain, and operate a railroad, is within N. Y. Laws 1848, ch. 40, as amended, authorizing the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, and making trustees personally liable for the corporate debts upon failure to file the annual statement therein prescribed: *Allen v. Clark*, 49 N. Y. St. Rep. 75; s. c. 21 N. Y. Supp. 338; s. c. aff'd, 141 N. Y. 548; 57 N. Y. St. Rep. 868. Director not liable who has transferred all his shares, and thereby vacated the office of director, if done openly, although to escape liability as a stockholder to creditors: *Sinclair v. Dwight*, 9 App. Div. (N. Y.) 297; s. c. 41 N. Y. Supp. 193.

²⁷ 3 Thomp. Corp., § 4216, *et seq.*

²⁸ *Clow v. Brown*, 134 Ind. 287; s. c. 33 N. El. Rep. 1126. That a judgment against the corporation, execution, and return of *nulla bona* are necessary to charge a director under

§ 8534. Liability for Creating or Assenting to Excessive Debts.—

Constitutional provisions and statutes fixing limits upon the amount or kind of indebtedness which corporations may contract, and making the directors and officers who consent to the contracting of debts in violation thereof, personally liable for the same, have already been considered.²⁹ In the more recent cases some of the judges appear to have been astute in frittering away the protection to the public which these provisions were designed to afford. Mere negligence in failing to pay any attention to the affairs of the company and suffering a single majority stockholder to run its affairs at his pleasure, is not an "assent" to the creation of an excessive indebtedness created by such stockholder.³⁰ The "assent" of the director must be an "assent" given while sitting as a member of the board at an official meeting, and acting concurrently with the others, although this assent may be proved by other evidence than the minutes of the meeting.³¹ A debt created by a corporation by exchanging its notes with another corporation, with the intention that each corporation shall take care of the other's note, is not a *bona fide* debt, for which the directors of one of the corporations can be charged under such a statute.³² The "indebtedness" referred to in a statute of this kind includes the *bonded* indebtedness of the corporation.³³ The "capital stock paid in," within the meaning of the same statute,

such a statute,—see *Berwind-White Coal Min. Co. v. Ewart*, 90 Hun (N. Y.) 60; s. c. 70 N. Y. St. Rep. 233; 35 N. Y. Supp. 573. Under the Illinois statute, the members or stockholders of a corporation *illegally formed* are *liable as partners* for its acts or contracts; and directors, officers, and agents acting and contracting in its name, render themselves personally liable, independently of statute: *Loverin v. McLaughlin*, 161 Ill. 417; s. c. 12 Nat. Corp. Rep. 326; 44 N. E. Rep. 99; affg. s. c. 46 Ill. App. 373.

²⁹ 3 *Thomp. Corp.*, § 4259, *et seq.*

³⁰ *Lewis v. Montgomery*, 145 Ill. 30; s. c. 33 N. E. Rep. 880; affg. s. c. 48 Ill. App. 282. The decision ought to have been reversed. Negligent ignorance in such a case ought to be regarded as actual knowledge, as it is in most other cases; and the negligent director ought to have been estopped from setting up his ignorance,

and consequent violation of duty to escape the liability prescribed by the statute.

³¹ *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943. This decision is scandalously unsound. Under it, directors desiring to incur an indebtedness in violation of the statute without incurring the liability which it denounces, may readily accomplish that result by failing to hold a board meeting with reference to the matter at all, but by button-holing each other on the street, and thereby securing the separate assent of each.

³² *Wolverton v. Taylor*, 157 Ill. 485; s. c. 42 N. E. Rep. 49.

³³ *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943; *Green v. Whitehead*, 5 Pa. Dist. Rep. 613.

is the amount subscribed and paid by the stockholders, and not the amount of all the assets on hand, available for payment of debts, no matter how derived.³⁴ One to whom notes are *assigned* as a mere matter of convenience *for collection*, without transferring to him any beneficial interest, cannot maintain a suit against directors of the corporation issuing such notes to enforce their statutory liability for assenting to indebtedness in excess of the capital stock.³⁵ A creditor, suing to charge directors under such a statute, must prove that the corporation was indebted to them at the time of filing the bill.³⁶ In Tennessee, the statutory liability is a fund created for the benefit of all the creditors whose debts were incurred, with the assent of the directors, in excess of the capital stock paid in, and a bill to enforce this liability must be filed in behalf of all creditors *so situated*.³⁷ In New York, the remedy given by the statute against the directors is *secondary*, and can only be resorted to after the usual remedies against the corporation have been exhausted by judgment, execution, and return of *nulla bona*; and then only by a suit in equity where all the creditors and the corporation itself are made parties, so that an accounting can be had and equities adjusted.³⁸ Under the Tennessee statute, where the corporate assets paid in and remaining in the treasury subject to the payment of the corporate debts, though less than the subscribed stock, exceed all the indebtedness of the corporation, the directors are not personally liable as having created debts in excess of the capital stock.³⁹

§ 8535. Liability for Declaring and Paying Unlawful Dividends.

— Statutes making directors liable to creditors for declaring and paying dividends when the corporation is insolvent have already been considered.⁴⁰ For the purpose of determining whether the directors have incurred liability under such a statute, the propriety

³⁴ *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943.

³⁵ *Wolverton v. Taylor*, 157 Ill. 485; s. c. 42 N. E. Rep. 49.

³⁶ *Wolverton v. Taylor*, 157 Ill. 485; s. c. 42 N. E. Rep. 49.

³⁷ *Moulton v. Connell-Hall-McLester Co.*, 93 Tenn. 377; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943.

³⁸ *National Bank v. Dillingham*, 147 N. Y. 603; 42 N. E. Rep. 338; 49 Am. St. Rep. 692; rev'g s. c. 86 Hun (N. Y.) 100. *Contra*, in Illinois, no judgment being necessary: *Wolverton v. George H. Taylor Co.*, 43 Ill. App. 424.

³⁹ *Albitztigui v. Guadelupe & c. Min. Co.*, 92 Tenn. 598; s. c. 22 S. W. Rep. 739.

⁴⁰ 3 Thomp. Corp., § 4288, *et seq.*

of their action in declaring the dividend is to be determined with reference to the financial condition of the company at the time when the dividend is declared, and is not to be determined by its ultimate insolvency, due to a paralysis of the business.⁴¹ The fact that the indebtedness of a corporation exceeds its capital stock paid in at the time of the declaration of a dividend will not render directors liable to creditors under such a statute, when the dividend is declared from profits estimated upon the basis that the assets are reasonably worth, or honestly believed to be worth, largely more than the company's indebtedness.⁴² The liability which is imposed upon directors by the New York statute⁴³ for the full amount of the capital of the corporation which is withdrawn with their consent for the purpose of paying dividends, is *not a penalty, but an indemnity* to the creditors against loss by the declaration of unauthorized dividends; and the directors are relieved from liability, if the apparent impairment of the capital is made good by the payment of debts which would have been included in the loss account at the time the dividend was declared.⁴⁴

§ 8536. Directors not Liable to Corporation for Transactions whereof it has Elected to Receive the Benefit.—A director is not liable under a statute⁴⁵ giving an action against directors for official misconduct, for an act whereof the corporation has received and retained the benefit.⁴⁶

§ 8537. Acquiescence of Shareholders.—Acquiescence of all the stockholders of a corporation in an act of the directors in dealing with its assets for the purpose of depriving future creditors of payment of their just claims, will not avail as a defense to a suit brought by an officer of the corporation under the New York

⁴¹ *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943.

⁴² *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; s. c. 31 L. R. A. 593; 32 S. W. Rep. 1097; 49 Am. St. Rep. 943.

⁴³ N. Y. Laws 1892, ch. 688, § 23.

⁴⁴ *Dykman v. Keeney*, 10 App. Div. (N. Y.) 610; s. c. 42 N. Y. Supp. 488. Compare *Dykman v. Keeney*, 154 N. Y. 483 (reversing s. c. 21 App. Div. 114)—which seems to have been a

different action. Further as to the liability of directors for improperly declaring and paying dividends,—see *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Williams v. Boice*, 38 N. J. Eq. 364; *Leed's Estate & Co. v. Shepherd*, 36 Ch. Div. 787; *Excelsior Water & Co. v. Pierce*, 90 Cal. 131; *Re Denham*, 25 Ch. Div. 752.

⁴⁵ N. Y. Code Civ. Proc., § 1781.

⁴⁶ *Halpin v. Mutual Brewing Co.*, 20 App. Div. (N. Y.) 583; s. c. 47 N. Y. Supp. 412.

statute⁴⁷ which gives a right of action to compel the directors to account for their official misconduct.⁴⁸

§ 8538. **Personal Liability of Trustees of Corporations Created for Purposes Other than for Profit.**—In Ohio there is this statute: “The trustees of a corporation created for a purpose other than profit, shall be personally liable for all debts of the corporation by them contracted.” A certificate of membership in a *mutual insurance company*, is not, after the happening of a loss, a “debt of the corporation” within the meaning of this statute.⁴⁹

⁴⁷ N. Y. Code Civ. Proc., § 1781.

⁴⁸ Halpin v. Mutual Brewing Co., 20 App. Div. (N. Y.) 583; s. c. 47 N. Y. Supp. 412; distinguishing Kent v. Quicksilver Min Co., 78 N. Y. 159; Skinner v. Smith, 134 N. Y. 240; Martin v. Niagara Falls Paper Man. Co., 122 N. Y. 165; Little v. Garabrant, 90 Hun (N. Y.) 404.

⁴⁹ Manufacturers' Fire Asso. v.

Lynchburg Drug Mills, 8 Ohio C. C. 112. That, in order to such a liability the case must be fairly brought within the terms of the statute,—see Wetter v. Lewis, 22 Misc. (N. Y.) 12; s. c. 48 N. Y. Supp. 617.

TITLE TWENTY-FOUR.

RECENT DECISIONS ON THE OFFICERS OF
CORPORATIONS OTHER THAN
DIREOTORS.

TITLE TWENTY-FOUR.

RECENT DECISIONS ON THE OFFICERS OF CORPORATIONS OTHER THAN DIRECTORS.

CHAPTER

- CCXXIV. Powers of the President, either Acting Alone or Conjointly with Some Other Officer §§ 8541-8548.
- CCXXV. Powers of Ministerial Officers Other than President §§ 8550-8563.
- CCXXVI. Liabilities of Ministerial Officers §§ 8581-8586.
- CCXXVII. Compensation of Officers §§ 8581-8586.

CHAPTER CCXXIV.

POWERS OF THE PRESIDENT, EITHER ACTING ALONE OR CONJOINTLY WITH SOME OFFICER.

- | SECTION | SECTION |
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| 8541. View that the contracting power of the president is of a limited nature. | 8545. What the president and secretary, acting together, may not do. |
| 8542. Powers which have been ascribed to the president of a corporation. | 8546. What the president of a corporation, who is also its general manager, may do. |
| 8543. Powers which have been denied to the president of a corporation. | 8547. What the president, who is also general manager, may not do. |
| 8544. What the president and secretary, acting together, may do. | 8548. Declarations of president, when bind corporation, and when not. |

§ 8541. View that the Contracting Power of the President is of a Limited Nature.—As already seen, there are two theories as to the implied power of the president of a business corporation.¹ The

¹ 4 Thomp Corp., § 4617, *et seq.*

Supreme Court of Indiana take the theory which minimizes those powers. In a recent case it says, speaking through Mr. Justice Monks: "The president of a corporation, by virtue of his office merely, has very little authority to act for the corporation; his powers depend upon the nature of the company's business and the authority given him by the board of directors. The board of directors may invest him with authority to act as the chief executive officer of the company; this may be done by resolution, or by acquiescence in the course of dealing and manner of transacting the business of the corporation. When a contract is made in the name of a corporation by the president, in the usual course of business, which the directors have the power to authorize him to make, or to ratify after it is made, the presumption is that the contract is binding on the corporation, until it is shown that the same was not authorized or ratified. 'One dealing with the president of a corporation, in the usual course of business, and within the powers which the president has been accustomed to exercise without objection from the directors, has the right to assume that the president has been invested with those powers.'"²

§ 8542. Powers which Have Been Ascribed to the President of a Corporation.—In the absence of any express grant of power, or of an acquisition of power implied from custom, or holding-out, or habit of acting, judicial theory has ascribed to the presidents of the various kinds of corporations below named, the power to do the various acts named below, as powers implied in the office itself, or as necessarily included in the granted power to do some other act:—In the president of a *national bank*, to guarantee commercial paper on making a sale thereof;³ in the president of a *national bank*, to pledge its deposit kept with another bank as security for loans;⁴ in the president of a *bank*, to offer a reward for information leading to the arrest of its absconding teller;⁵ in the president of a *bank*, to assign a judgment recovered by the

² *National Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 355-356.

³ In the absence of notice to such purchaser of such paper of a want of such authority: *Thomas v. City Nat. Bank*, 40 Neb. 501; s. c. 24 L. R. A. 263; 58 N. W. Rep. 943.

⁴ Such power inferred from the course of business which the directors

had permitted to grow up: *Bell v. Hanover Nat. Bank*, 57 Fed. Rep. 821; s. c. 10 Bkg. L. J. 21.

⁵ Such action not being prohibited by the by-laws: *Bank of Minneapolis v. Griffin*, 168 Ill. 314; s. c. 15 Bkg. L. J. 44; 48 N. E. Rep. 154; aff'g s. c. 66 Ill. App. 577.

bank, to a trustee for collection;⁶ in a president of a *trading corporation*, to employ an attorney to defend a suit brought against it,⁷ whenever the exigencies of the corporation require it to be done;⁸ to execute an assignment for creditors under a general resolution of the directors that such an assignment be executed to a trustee to be named by the president;⁹ in the president of a *street railway company*, to employ an *engineer* and *bookkeeper* for the term of one year.¹⁰

§ 8543. Powers which Have Been Denied to the President of a Corporation.—In the absence of an express grant of power in the governing statute, articles of incorporation, by-laws, resolution of the board of directors, custom, habit of acting, or other authoritative source, judicial theory has denied to the presidents of various corporations the power to do the following acts:—To bind the corporation, in favor of a person with notice, by giving the note of the corporation to pay his personal debt;¹¹ to issue a certificate of the stock of the corporation bearing date seven years before;¹² to execute a *cognovit* upon which judgment may be entered against the corporation;¹³ to make a *subscription* for the payment of a designated sum by the corporation, upon the definite acceptance of specified lots as a site for a post-office building;¹⁴ to release a subscriber to the stock of the corporation;¹⁵ to dispose of “treasury stock” of the corporation;¹⁶ to make a general assignment of the assets of the corporation for the benefit of its creditors;¹⁷ to indorse the name of the corporation upon commercial paper for accom-

⁶ To the end that the trustee may maintain an action thereon in connection with a judgment against the same debtor assigned to him by another creditor: *Guernsey v. Black Diamond Coal &c. Co.*, 99 Iowa, 471; s. c. 68 N. W. Rep. 777.

⁷ *Boston Tailoring House v. Fisher*, 59 Ill. App. 400.

⁸ *Streeten v. Robinson*, 102 Cal. 542; s. c. 36 Pac. Rep. 946.

⁹ *Rogers v. Pell*, 154 N. Y. 518; s. c. 49 N. E. Rep. 75.

¹⁰ *Trawick v. Peoria &c. R. Co.*, 68 Ill. App. 156.

¹¹ *Kelley v. Post*, 37 Ill. App. 396.

¹² The certificate was *forged*: *Manhattan L. Ins. Co. v. Forty-second Street &c. R. Co.*, 139 N. Y. 146; s. c. 54 N. Y. St. Rep. 474; 9 Bkg. L. J. 495; 34 N. E. Rep. 776.

¹³ *Raub v. Blairstown Creamery Asso.*, 56 N. J. L. 262; s. c. 28 Atl. Rep. 384.

¹⁴ *B. S. Green Co. v. Blodgett*, 49 Ill. App. 180; s. c. aff'd, 55 id. 556; s. c. aff'd, 159 Ill. 169.

¹⁵ *United Growers Co. v. Eisner*, 22 App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906; citing *Olney v. Chadsey*, 7 R. I. 224.

¹⁶ Without rendering himself liable to account to the corporation for the proceeds: *Re Utica Nat. Brew. Co.*, 154 N. Y. 268; s. c. 48 N. E. Rep. 521; 7 Am. & Eng. Corp. Cas. (N. S.) 666; aff'g 19 App. Div. (N. Y.) 627.

¹⁷ *Webb v. Midway Lumber Co.*, 68 Mo. App. 546.

modation;¹⁸ to convey the land of the corporation under the authority to employ counsel merely;¹⁹ to make a deed of a patent for an invention upon the possession of which the whole business of the corporation depends;²⁰ to appoint himself assignee of the corporation for its creditors, under a resolution authorizing him to nominate a trustee to carry into effect the assignment;²¹ in the president of a town-site corporation, to employ an architect to make plans for a new and extensive building;²² to prescribe the mode of selling the shares of the corporation which are to be sold upon an increase of its capital stock, although stockholders have attempted to delegate to him that power;²³ in the president of a bank, to sell a horse belonging to the bank;²⁴ nor to bind the bank as surety upon an undertaking for a judicial order of arrest in a proceeding in which the bank is not interested;²⁵ nor, in the president of a saving, loan, and trust company, to release or discharge a debt due to the company on payment of part only.²⁶

§ 8544. What the President and Secretary, Acting Together, May Do.—The president and secretary of a corporation, acting together, are its proper officers for the formal execution of deeds, mortgages, and the most formal contracts which it has power to make. The secretary is the custodian of its seal;²⁷ and the use of the seal carries with it a presumption of precedent authority, where the contract is authorized ostensibly by the signatures of the president and secretary. Such being the mode of executing corporate instruments of a formal nature, authority is implied in the president

¹⁸ *Pick v. Ellinger*, 66 Ill. App. 570; s. c. 1 Chic. L. J. Wkly. 694.

¹⁹ *Tempel v. Dodge*, 89 Tex. 68; s. c. 33 S. W. Rep. 222; denying rehearing in 12 Am. R. & Corp. Rep. 172; s. c. 32 S. W. Rep. 514.

²⁰ Especially for a consideration which does not pass to the corporation: *Kansas City Hay Press Co. v. Devol*, 72 Fed. Rep. 717.

²¹ But creditors cannot avail themselves of the objection: *Rogers v. Pell*, 154 N. Y. 518; s. c. 49 N. E. Rep. 75.

²² Nor — according to this doubtful case — does the mere circumstance that he has previously employed the architect to do some repairs or remodeling upon a building belonging

to the corporation, imply a power to contract with reference to a new building: *Mathias v. White Sulphur Springs Asso.*, 19 Mont. 359; s. c. 48 Pac. Rep. 624.

²³ *Smith v. Franklin Park Land & Co.*, 168 Mass. 345; s. c. 47 N. E. Rep. 409.

²⁴ *Greenawalt v. Wilson*, 52 Kan. 109; s. c. 34 Pac. Rep. 403. There is no sense in holding that it requires a resolution of a board of directors to sell a horse.

²⁵ *Long v. Hubbard*, 6 Kan. App. 878; s. c. 15 Bkg. L. J. 106; 50 Pac. Rep. 968.

²⁶ *State Sav. Loan & Co. v. Stewart*, 65 Ill. App. 391.

²⁷ 4 *Thomp. Corp.*, § 5090.

and secretary of a business corporation to execute in its behalf contracts which are within the general scope of its powers; and one who takes such a contract, so executed, will be protected, unless he has knowledge of a want of authority on the part of the officers who profess to act for the corporation, or unless the circumstances are such as to put him upon inquiry as to whether they have power in a particular case.²⁸ If a corporation commits the entire management of its affairs to its president and secretary, and holds no meetings of its directors except when the president sees fit to call them together, a conveyance of land, made by the president and secretary without official authority from the board, will be deemed valid in favor of a bank which has made large advances upon notes secured by a vendor's lien, given to the president and secretary for the purchase money and transferred to the bank.²⁹ The president and secretary of a corporation have implied or *ex officio* authority to execute notes of the corporation, unless their authority in this respect is specifically limited.³⁰

§ 8545. **What the President and Secretary, Acting Together, May not Do.**—On more or less similar premises, the power has been denied to the president and secretary of a business corporation to do the following acts so as to bind the corporation:—To transfer substantially all the corporate property to certain creditors by way of preference to them;³¹ to convey an interest in a canal and pipe line, where the directors have authorized merely the conveyance of a right to water to be delivered at specified points;³² to mortgage the property of the corporation to secure its directors against an existing liability as shareholders for the corporation;³³ to order machinery for the corporation such as it presumptively needs in the prosecution of its business;³⁴ to appoint an agent to

²⁸ *Winscott v. Guarantee Invest. Co.*, 63 Mo. App. 367; s. c. 2 Mo. App. Rep. 815.

²⁹ *Estes v. German Nat. Bank*, 62 Ark. 7; s. c. 34 S. W. Rep. 85.

³⁰ *Fisk v. Carbonized Stone Co.*, 67 Ill. App. 327.

³¹ *State Nat. Bank v. John Moran Packing Co.*, 68 Ill. App. 25; s. c. 2 Chic. L. J. Wkly. 36; aff'd, in 168 Ill. 519; s. c. 48 N. E. Rep. 82; citing *Winsor v. Lafayette County Bank*, 18 Mo. App. 665; *Hvde v. Larkin*, 35 Mo. App. 366; *McKeag v. Collins*, 87

Mo. 164; *Hoyt v. Thompson*, 5 N. Y. 320; *First Nat. Bank v. Asheville Furniture &c. Co.*, 116 N. C. 827.

³² *Fudickar v. East Riverside Irrig. Dist.*, 109 Cal. 29; s. c. 41 Pac. Rep. 1024.

³³ *Lowry Bkg. Co. v. Empire Lumber Co.*, 91 Ga. 624; s. c. 17 S. E. Rep. 968.

³⁴ *Des Moines Man. &c. Co. v. Tilford Milling Co.*, 9 S. Dak. 542; s. c. 70 N. W. Rep. 839 (decision grossly untenable).

manage, control, sell, and transfer the corporate property;³⁵ to execute negotiable notes in the name of the corporation.³⁶

§ 8546. **What the President of a Corporation, Who is also its General Manager, May Do.**—In considering this subject, we may start with the premise of a more or less doubtful decision, in a case attracting great attention, to the effect that the management of the entire business of a corporation may be intrusted to its president, either by an express resolution of the directors or by their acquiescence in a course of dealing; and that statutes requiring a corporation to be controlled and managed by directors, but authorizing them to appoint such subordinate officers and agents as the business may require, do not prevent the directors from intrusting the entire management of the business to the president, as this is not a delegation of corporate rights and powers, but a mere authorization to perform the business for and in the name of the corporation.³⁷ In the absence of an express grant of power, or of an implication of the possession of power from custom, holding-out, or habit of acting,—judicial theory has ascribed to the president of various kinds of corporations, when also acting as the *general manager* of the corporation, the power to do any act in the ordinary transaction of its business in behalf of the corporation so as to bind it;³⁸ in the president of a charitable corporation, to institute a suit to foreclose a mortgage;³⁹ in the president of a railway corporation, to promise to repay to a purchaser of land from the corporation the purchase money and interest, in case the

³⁵ Johnson v. Sage, (Idaho) 3 Am. & Eng. Corp. Cas. (N. S.) 543; s. c. 44 Pac. Rep. 641.

³⁶ City Electric Street R. Co. v. First Nat. Exch. Bank, 62 Ark. 33; s. c. 12 Nat. Corp. Rep. 58; 34 S. W. Rep. 89; 31 L. R. A. 535 (decision untenable). A very respectable court, in one of its decisions in an important case, put forth the weak and untenable view that a mortgage executed by the president and secretary of a corporation, in pursuance of an invalid resolution of the board of directors, cannot be upheld as a valid exercise of their general powers, even if such powers were sufficient to enable them to execute the contract without a resolution: State Nat. Bank v. Union

Nat. Bank, 168 Ill. 519; s. c. 48 N. E. Rep. 82; aff'g 68 Ill. App. 25; 2 Chic. L. J. Wkly. 36.

³⁷ Jones v. Williams, 139 Mo. 1; s. c. 37 L. R. A. 682; 39 S. W. Rep. 486; 40 S. W. Rep. 353; 6 Am. & Eng. Corp. Cas. (N. S.) 734; 61 Am. St. Rep. 436.

³⁸ Unless the other party to the transaction has notice of his want of power: Powers v. Schlicht Heat & Co., 23 App. Div. (N. Y.) 380; s. c. 48 N. Y. Supp. 237. Especially where the president is the substantial owner of the corporate stock: Senour Man. Co. v. Clarke, 96 Wis. 469; s. c. 71 N. W. Rep. 883.

³⁹ Smith Charities v. Connolly, 157 Mass. 272; s. c. 31 N. E. Rep. 1058.

title proves defective;⁴⁰ in the president of a stage company, to enter into a contract with an individual granting him an equal interest in such contracts for carrying mail as the corporation may secure;⁴¹ in the president of a business corporation, to make a power of attorney to confess judgment upon procuring the discounting of a note of the corporation.⁴² The president of a corporation, acting as its manager and controlling man, may assent to a *reformation of a contract* negotiated and executed by him in the name of the corporation, by inserting the proper term, instead of one embodied therein by *mistake*.⁴³

§ 8547. **What the President, who is also General Manager, May not Do.**—Upon premises more or less similar to the foregoing, judicial theory has denied to the president of a corporation, who is also clothed with the office of its general manager, the power to bind the corporation by the following acts:—By executing a note in the name of the corporation to a third person for an amount due him from such corporation;⁴⁴ by encumbering its property by mortgage or by confessing a judgment for money borrowed, although he has been accustomed to borrow money for the corporation;⁴⁵ in the president of a railway company, to indemnify a sub-contractor against loss in consideration of his continuing the construction of the road after he is justified in abandoning it because of a breach of the contract on the part of the principal contractor;⁴⁶ in the president of a business corporation, to enter into a transaction by which the corporation prefers one of its creditors, being in failing circumstances.⁴⁷

§ 8548. **Declarations of President, when Bind Corporation, and when not.**—Declarations of the agents of corporations made *dum fervet opus*, and with reference to matters within the scope of their authority, bind the corporation in like manner as declara-

⁴⁰ *Dubuque &c. R. Co. v. Pierson*, N. Y. 471; s. c. 51 N. Y. St. Rep. 277; 70 Fed. Rep. 303; s. c. 36 U. S. App. 33 N. E. Rep. 561.

⁴¹ 136; 17 C. C. A. 401; rehearing denied in 71 Fed. Rep. 268; s. c. 36 U. S. App. 385; s. c. 17 C. C. A. 408.

⁴² *Calvert v. Idaho Stage Co.*, 25 Or. 412; s. c. 36 Pac. Rep. 24.

⁴³ Especially where the act was not objected to by the directors after acquiring knowledge of it: *Ford v. Hill*, 92 Wis. 188; s. c. 66 N. W. Rep. 115.

⁴⁴ *Nichols v. Scranton Steel Co.*, 137

44 *Miller v. Reynolds*, 92 Hun (N. Y.) 400; s. c. 36 N. Y. Supp. 660; 71 N. Y. St. Rep. 574. The conclusion should have been just the reverse.

⁴⁵ *Smead Foundry Co. v. Cheshbrough*, 3 Ohio Dec. 534.

⁴⁶ *Grant v. Duluth &c. R. Co.*, 66 Minn. 349; s. c. 69 N. W. Rep. 23.

⁴⁷ *Dooley v. Pease*, 79 Fed. Rep. 860.

tions of the agents of individuals bind their principals. On clearer ground, a statement by the president of a corporation, authorized to represent it within the lines of its usual business, to the holder of a note of the corporation, who had the election to declare the same immediately due upon the failure or insolvency of the corporation, that the corporation is insolvent and is about to make an assignment, is within the scope of his authority and is chargeable to the corporation.⁴⁸ But according to the view of the Supreme Court of Pennsylvania, an investment company is not bound by the declarations of its president as to its condition, made to the maker of a note to the corporation secured by a deposit of its stock as collateral, whereby the latter was induced to keep his stock, instead of selling it and paying the note.⁴⁹

⁴⁸ Merchants' Nat. Bank v. Columbia Spinning Co., 21 App. Div. (N. Y.) 383; s. c. 47 N. Y. Supp. 442. ⁴⁹ Investment Co. v. Eldridge, 175 Pa. St. 287; s. c. 38 W. N. C. (Pa.) 181; 34 Atl. Rep. 629.

CHAPTER CXXV.

POWERS OF MINISTERIAL OFFICERS OTHER THAN PRESIDENT.

SECTION	SECTION
8550. Powers of the vice-president.	8558. What such managing officer or agent may not do.
8551. Powers of the secretary.	8559. What officers have power to bind the corporation by issuing negotiable paper.
8552. Powers of secretary acting also as general manager.	8560. Interpretation of various instruments conferring powers.
8553. Powers of the treasurer.	8561. What powers implied from express grants of other powers, and what not.
8554. Powers of secretary and treasurer.	8562. Corporations bound by acts of their <i>de facto</i> officers.
8555. Powers of secretary and treasurer, acting also as general manager.	8563. Ministerial officers may have longer terms than the directors.
8556. Powers of general manager, general agent, sole agent, managing director, etc.	
8557. Further of the powers of general manager.	

§ 8550. Powers of the Vice-President.—So little does the law take notice of the powers of this officer that it may be said that, by virtue of his office, he is the mere *locum tenens* of the president, with the power of presiding at meetings of the board of directors in the absence of the president, and of doing little else without special authority. He cannot, of course, accept for the corporation a draft drawn thereon by one to whom the corporation is not indebted, since that is beyond the power of the corporation.¹ Nor can he employ a general agent of the company for the term of a year;² nor, in the absence of the president, can he bind the corporation by executing notes, where all previous notes have been executed and issued with the concurrence of the president, vice-

¹ Towle v. American Bldg. &c. Co., 78 Fed. Rep. 688.

² The first vice-president of a railroad corporation has no authority to make a contract for a year for the employment of one as general passenger and ticket agent, under a by-law of the corporation giving him gen-

eral charge of the passenger and freight traffic and providing that the officer of such departments shall be appointed by him subject to the approval of the president and may be removed by him at pleasure: Missouri &c. R. Co. v. Faulkner, 88 Tex. 649; s. c. 32 S. W. Rep. 883.

president and treasurer.³ But, like any other officer or agent of the corporation, he may act as its agent under special authority, express, or implied from the fact of being held out as agent, although not acting as president or vice-president; and, when so acting, his acts bind the corporation like those of any other agent.⁴ For example, if the vice-president of a railway corporation is *also its general counselor*, he has the implied power to bind the company by a contract employing an attorney and stipulating for the payment of his services; and an attorney so employed has the right, in the absence of notice to the contrary, to rely on the possession by him of this power.⁵

§ 8551. Powers of the Secretary.—The secretary of a corporation is the keeper of its records and its organ of communication with the public, and he ordinarily binds the corporation by a communication made to one dealing with it.⁶ He is also a proper officer to receive *notice* for the corporation from any outside person. As he is the proper person to receive *notice*, there is barely room for the conclusion that he can *waive* the necessity of notice of a fact affecting the rights of the corporation; and it has been held that he can bind the corporation by an agreement waiving notice of protest and non-payment of notes on which the corporation is an indorser.⁷ But this view is doubtful; and, outside of it, it may be said that, as a general rule, the secretary of the corporation has, by virtue of his office, no agency whatever to make contracts for the corporation, except where such agency is specially conferred, and then he possesses it by virtue of the special power, and not by virtue of his office.⁸ He is not an agent “whose powers are of general character” within the meaning of a statute providing that a contract may be implied on the part of the corporation from the acts of such agents.⁹ He cannot, for instance, without special authority,

³ *Morris v. Griffith &c. Co.*, 69 Fed. Rep. 131; s. c. 34 Ohio L. J. 191; 1 Ohio Dec. Fed. 170.

⁴ *Union Invest. Asso. v. Geer*, 64 Ill. App. 648; s. c. 1 Chic. L. J. Weekly, 549; *Metropole Bldg. &c. Co. v. Garden City Fan Co.*, 50 Ill. App. 681.

⁵ *St. Louis &c. R. Co. v. Kirkpatrick*, 52 Kan. 104; s. c. 34 Pac. Rep. 400.

⁶ *Curnan v. Delaware &c. R. Co.*,

138 N. Y. 480, 488; s. c. 53 N. Y. St. Rep. 25; 34 N. E. Rep. 201.

⁷ *Ludington v. Thompson*, 4 App. Div. (N. Y.) 117; s. c. 38 N. Y. Supp. 768; s. c. aff'd, 153 N. Y. 499.

⁸ *Simmons Hardware Co. v. Greely-Burnham Grocer Co.*, 64 Mo. App. 677; s. c. 2 Mo. App. Rep. 1081.

⁹ *Simmons Hardware Co. v. Greely-Burnham Grocer Co.*, 64 Mo. App. 677; s. c. 2 Mo. App. Rep. 1081.

bind the corporation by executing a promissory note in its name;¹⁰ nor by signing and attesting a paper evidencing a liability on the part of the company;¹¹ nor by a promise to the agent relating to the *commissions* which he is to receive for the sale of the company's goods;¹² nor by an order upon a merchant for goods to be delivered to a third person.¹³ In short, any attempt to define the contract powers of this officer would merely involve the exhibition of an extensive catalogue of contracts which he cannot make.

§ 8552. Powers of Secretary Acting also as General Manager.—

If the secretary of a corporation is clothed by the directors with the functions of general manager, general contracting powers on his part may be implied, coextensive with the business of the corporation, at least where the directors stand by and look on with knowledge of what he is doing and without making any objection.¹⁴ But such powers will appertain to the office of manager rather than to that of secretary.¹⁵

§ 8553. Powers of the Treasurer.— Presumptively, the treasurer of a corporation is the officer appointed to receive, keep, and disburse its funds, and to keep suitable records of his receipts and disbursements. It is doubtful whether, under any sound view of the nature of his office, the law ought to ascribe to him any *ex officio* powers as a contracting officer of the corporation. He has no implied power to deliver written obligations which are binding on the corporations,¹⁶—such, for example, as negotiable paper;¹⁷ though one authoritative court has ascribed to the treasurer of manufacturing and trading corporations,—including gas light companies,—the power to make and indorse such commercial paper as such a company might be expected to execute in the ordinary conduct of its business.¹⁸ Whilst he has the implied power to indorse the com-

¹⁰ *Nebraska &c. Loan Co. v. Bell*, 58 Fed. Rep. 326; s. c. 7 C. C. A. South. Rep. 139.

¹¹ *Blanding v. Davenport &c. R. Co.*, 88 Iowa, 225; s. c. 55 N. W. Rep. 81.

¹² *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579; s. c. 67 N. W. Rep. 607.

¹³ *Famous Shoe &c. Co. v. Eagle Iron Works*, 51 Mo. App. 66.

¹⁴ *Merchants' &c. Bank v. Hervey*

¹⁵ As to which, see *post*, § 8556.

¹⁶ *Re Millward-Cliff Cracker Co.*, 161 Pa. St. 157; s. c. 28 Atl. Rep. 1072, 1077.

¹⁷ *Oak Grove &c. Cattle Co. v. Foster*, 7 N. M. 650; s. c. 41 Pac. Rep. 522.

¹⁸ *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505; s. c. 9 Bkg. L. J. 450; 34 N. E. Rep. 1083.

mercial paper of the corporation for collection, and for the ordinary purposes of its bank account,¹⁹ he may, like any other corporate officer or agent, acquire larger powers by special authorization, by usage, by a holding-out. Where he is practically invested with the entire management of the business of the corporation, the power is no doubt correctly ascribed to him — not as treasurer *ex officio*, but as managing agent — to make an agreement submitting a claim to arbitration, although the by-laws provide that the concerns of the company shall be managed and conducted by trustees and that the business shall be in immediate charge of the president.²⁰

§ 8554. Powers of Secretary and Treasurer.— A person occupying the office of secretary and treasurer of a manufacturing corporation, and who has individually participated in the management of its business, has no implied authority to sell a portion of its manufacturing plant; and a contract for such a sale, unauthorized by the directors, will not be judicially enforced.²¹

§ 8555. Powers of Secretary and Treasurer, Acting also as General Manager.— The same may be said of the secretary and treasurer, where both offices are filled by the same person who acts also as general manager, especially if he owns a majority of the shares. The power to make on behalf of the corporation an assignment of a contract, without the formal authorization of the board of directors, is within his apparent authority.²² But where he is invested with no powers beyond those which the law ascribes to the dual office which he holds, the conclusion will be different.²³ One who acts as *treasurer* and *manager* of a business corporation, cannot, by virtue of his implied powers as manager, and without authority from the trustees, bind the corporation by an act which disables it from continuing the prosecution of its business. He cannot,

¹⁹ 4 Thomp. Corp., § 4722.

²⁰ Remington Paper Co. v. London Assur. Corp., 12 App. Div. (N. Y.) 218; s. c. 43 N. Y. Supp. 431.

²¹ Winsted Hosiery Co. v. New Britain Knitting Co., 69 Conn. 565; s. c. 38 Atl. Rep. 310.

²² Moore v. H. Gaus & Sons Man. Co., 113 Mo. 98; s. c. 20 S. W. Rep. 975.

²³ A resolution by the directors of a corporation, providing for the delivery

to its secretary and treasurer of notes payable to the corporation, as collateral to a debt due the secretary and treasurer by the corporation for an advance, does not authorize him to indorse the notes so as to bind the corporation; because, in performing such an act, he is acting *for himself*, and not as agent for the corporation: Security Bank v. Kingsland, 5 N. Dak. 263; s. c. 65 N. W. Rep. 697.

for example, when the company is threatened with an attachment, agree with some of the creditors to turn over to them most of the materials and stock in trade of the company in payment of their debts, some of which are not due; but such an act, unless duly ratified, will be treated as *ultra vires*. Nor is it legally ratified by proceedings which take place at a meeting of a majority merely of the directors, assembled without notice to the others, at an unusual time and place; since the proceedings which take place at a meeting so assembled cannot be treated as valid.²⁴ On a principle about to be considered,²⁵ a corporation which has practically intrusted to its treasurer the *entire management* of its business, without any supervision of any of the other officers or directors, except one director who concurs in the treasurer's action, is liable upon a note executed in its name by him, although its by-laws require notes to be countersigned by the president.²⁶

§ 8556. Powers of General Manager, General Agent, Sole Agent, Managing Director, Etc.—The courts ascribe to whatever corporate agent, under whatever name, is clothed with the *general management* of the business of a corporation, the power to do whatever is ordinarily done in the management of the business of such concerns; and third persons dealing with the corporation through such agent, may safely act upon the assumption that he possesses such powers, in the absence of notice to the contrary, or of circumstances putting a prudent person upon inquiry. He has implied power to emit commercial paper;²⁷ purchase feed for cattle belonging to the company;²⁸ raise money by assigning its accounts for collection;²⁹ borrow money to meet its bills as they mature in the ordinary course of its business;³⁰ contract to employ laborers for a year;³¹

²⁴ First Nat. Bank v. Asheville Furniture &c. Co., 116 N. C. 827.

²⁵ Post, § 8556.

²⁶ Perry v. Council Bluffs City Water Works Co., 67 Hun (N. Y.) 456; s. c. 51 N. Y. St. Rep. 326; 22 N. Y. Supp. 151; 8 Bkg. L. J. 437; s. c. aff'd 143 N. Y. 637; s. c. 60 N. Y. St. Rep. 875. For a transaction where money was advanced on the individual stock of the assistant treasurer and manager, and was held not to be a loan to the corporation, see Sperry v. Pittsburg Short-Method Smelting &c. Co., 9 Colo. App. 314; s. c. 48 Pac. Rep. 315.

²⁷ Gane v. Loemo Printing Co., 46 Ill. App. 456.

²⁸ Powder River Live Stock Co. v. Lamb, 38 Neb. 339; s. c. 56 N. W. Rep. 1019.

²⁹ Greig v. Riordan, 99 Cal. 316; s. c. 33 Pac. Rep. 913.

³⁰ Rosemond v. Northwestern &c. Register Co., 62 Minn. 374; s. c. 64 N. W. Rep. 925.

³¹ Stahlberger v. New Hartford Leather Co., 92 Hun (N. Y.) 245; s. c. 36 N. Y. Supp. 708; 71 N. Y. St. Rep. 773.

and in these and like cases a stranger dealing with the corporation is not affected by secret restrictions upon his powers of which he has no notice. In short, the implied powers of one who has been appointed general manager of the business of a corporation, are, in America, generally understood to be coextensive with the general scope of its business.³² For example, if the company employs workmen, he may bind it by a contract made with a third person to furnish board for them.³³ It is a sound view that an agent of a corporation who, by a resolution of the board of directors, is "authorized to take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest,"—has power to do any act within the scope of the business operations of the company, and, in the discharge of such duties, to appoint agents with the power to make contracts which shall bind the company.³⁴ He has, for example, the implied power to dispose of its property in the ordinary course of its business. A person dealing with the corporation through him may safely act on the assumption of his possessing this power in the absence of anything indicating a want of it.³⁵ Thus, the general manager of a manufacturing corporation has the implied power to sell its products; and his contracts to this end are none the less binding upon the corporation from the fact that he attempted to reduce them to writing, which, under the by-laws, he was not authorized to do. Its customers are not bound by such a by-law unless they have notice of it.³⁶

§ 8557. **Further of the Powers of General Manager.**—A general manager, having the exclusive management and conduct of the

³² *Prentice v. United States & Steamship Co.*, 58 Fed. Rep. 702.

³³ *Clowe v. Imperial Pine Product Co.*, 114 N. C. 304; s. c. 19 S. E. Rep. 153.

³⁴ For example, he may authorize an agent in another State to hire a barge for the transaction of its business of transporting timber, where any emergency requires such hiring: *Tennessee River Transp. Co. v. Kavanaugh*, 101 Ala. 1; s. c. 13 South. Rep. 283.

³⁵ *National Bank v. Goolsby*, 12 Tex. Civ. App. 362; s. c. 35 S. W. Rep. 713.

³⁶ *Cone v. Empire Plaid Mills*, 12 App. Div. (N. Y.) 314; s. c. 42 N. Y. Supp. 160. As to the powers of gen-

eral managers of corporations, see also *Davis v. New York Concert Co.*, 36 N. Y. St. Rep. 816; s. c. aff'd, 128 N. Y. 635; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430; *Topeka Primary Asso. v. Martin*, 39 Kan. 750; *St. Louis & C. R. Co. v. Grove*, 39 Kan. 731; *Gane v. Loemo Printing Co.*, 46 Ill. App. 456; *Greig v. Riordan*, 99 Cal. 316. That the general agent of a *town company*—a company organized to "boom" a town in a new country, may bind a company by a guaranty that the railroad will be constructed and in operation to the town within a given time,—see *Arkansas Valley Town & C. Co. v. Lincoln*, 56 Kan. 145; s. c. 42 Pac. Rep. 706.

manufacturing and commercial business of a corporation, with power to purchase stock, contract debts, and discount notes, may *borrow money* to pay debts or purchase goods and give the *negotiable note* of the corporation therefor.³⁷ It seems that the manager of a mining company can bind it by a contract for the erection of a boarding-house, necessary for the efficient operation of the mine, where the other party has no knowledge of a contract between the company and its vendor of the mine by which the latter agreed to erect such boarding-house.³⁸ The superintendent of lime-kilns owned by a corporation, whose duty it is to burn lime requiring the use of wood, has implied authority to purchase wood, where the corporation has none of its own.³⁹ The manager of a manufacturing corporation, having general control of its business, has the implied power to bind the corporation by a contract for the lease of a building to protect its property.⁴⁰ In such a case, if the corporation avails itself of the benefits of a lease entered into by its manager, by taking possession of the premises, it cannot subsequently claim that the manager had no authority to execute the lease.⁴¹ Whether one who had for five years the charge of the affairs of a corporation as its superintendent or general manager, and who was also a member of its board of directors, had authority to bind it by a promise to pay for the services of a nurse in taking care of an *injured employe*, was held a question for the jury; nor did it make any difference that the employe was cared for at his own residence.⁴² Another court has held that the *president, vice-president, general manager, secretary, and treasurer* of a *railroad corporation* may exercise any power which the corporation itself has to employ medical attendance for workmen injured in the performance of duty in the company's service.⁴³ It is immaterial whether

³⁷ Glidden &c. Varnish Co. v. Interstate Nat. Bank, 69 Fed. Rep. 912; s. c. 16 C. C. A. 534; 32 U. S. 654.

³⁸ Miller v. Cochran Hill Gold Min. Co., 29 N. S. 304. Two of the judges, while concurring in the result, thought that so to pledge the credit of the company was not within the apparent or implied scope of the authority of the manager.

³⁹ Kaes v. Lime Co., 71 Mo. App. 101.

⁴⁰ William Wicke Co. v. Kaldenberg Man. Co., 21 Misc. (N. Y.) 79; s. c. 46 N. Y. Supp. 937.

⁴¹ William Wicke Co. v. Kaldenberg Man. Co., 21 Misc. (N. Y.) 79; s. c. 46 N. Y. Supp. 937.

⁴² Hodges v. Detroit Electric Light &c. Co., 109 Mich. 547; s. c. 3 Det. L. N. 201; 4 Am. & Eng. Corp. Cas. (N. S.) 352; 67 N. W. Rep. 564. For a collection of decisions upon the question of the duty of a master to *furnish medical aid* for his injured servant, see note, 28 L. R. A. 546.

⁴³ Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492; s. c. 46 N. E. Rep. 1022; 60 Am. St. Rep. 172. Compare *ante*, § 8388.

the authority of the acting head of a corporation, through whom its general and usual affairs are transacted, to perform a certain act incident to the execution of the trust reposed in him, exists by virtue of his office, or is imposed by the business conduct of the corporation. If, by a course of conduct, the corporation holds him out as possessing power to do a certain act and he does it, the corporation will be estopped, as against innocent persons, to repudiate it.⁴⁴ A corporation which has appointed a person as its business agent, and allowed him to remain in that position for more than a year, is bound by all his acts within the scope of his agency; and his general authority cannot be limited by private instructions not brought to the notice of those with whom he has been dealing as such agent. The general authority conferred by such an appointment is not limited by the expression in the resolution of appointment, "also to act under the supervision of said board" of directors, but such an agent has authority to sign notes which will bind the corporation.⁴⁵ Persons dealing with the director of an English company who assumes to do, as *managing director*, an act which may be delegated to him by his co-directors under the articles of association, may assume that he has the power, and will not be affected by an informality in the delegation of which they have no notice.⁴⁶

§ 8558. What Such Managing Officer or Agent May not Do.—

A general manager of a corporation, although expressly authorized by the by-laws to sign notes, drafts, and acceptances in the name of the company, and to make checks upon its bank funds for the payment of any proper indebtedness of the company, has no implied authority to *guarantee* in the name of the company notes of a former firm of which he was a member, to whose business and assets the corporation succeeded without assuming its debts and liabilities. This decision rests on the reason of those cases which hold that it is *ultra vires* for the officers of a corporation to pledge its funds, by making or indorsing *accommodation paper*, or otherwise, for the payment of the debts of third persons.⁴⁷ The power

⁴⁴ *Cox v. Robinson*, 82 Fed. Rep. A.) (1896), 2 Ch. 93; s. c. 65 L. J. Ch. 277; s. c. 48 U. S. App. 388; 27 C. C. (N. S.) 536; 74 Law T. Rep. 473. A. 120.

⁴⁵ *McCreery v. Garvin*, 39 S. C. 375; s. c. 17 S. E. Rep. 828.

⁴⁶ *Eiggerstaff v. Rowatt's Wharf (C.*

A.) (1896), 2 Ch. 93; s. c. 65 L. J. Ch. 277; s. c. 48 U. S. App. 388; 27 C. C. (N. S.) 536; 74 Law T. Rep. 473.

⁴⁷ *Dobson v. More*, 164 Ill. 110; s. c. 13 Nat. Corp. Rep. 372; 45 N. E. Rep. 243; aff'g s. c. 62 Ill. App. 435.

has been denied to the general manager of a banknote engraving company to bind the company by a contract to employ the services of a person for so long a term as *three years*.⁴⁸ The manager of a corporation which has conveyed its property and business to a trustee, upon a trust to continue its business for a certain time for the benefit of its creditors, has no implied authority to contract on behalf of the corporation, with the trustee, as to the compensation of the latter.⁴⁹ The officers of a corporation *not organized for pecuniary profit* have, in the absence of authority in the by-laws, no power to execute a *lease* of its property; and such a lease will give no interest in the premises.⁵⁰ The officers of a corporation cannot, without the knowledge of the directors and stockholders, *guarantee the notes of third persons*;⁵¹ and in the case of most corporations, they cannot do it at all.⁵² A general power conferred upon the *executive officers* of a corporation, to appoint, remove, and fix the compensation of employes, does not authorize them to make a contract of *employment for the life of an employe*.⁵³

§ 8559. What Officers Have Power to Bind the Corporation by Issuing Negotiable Paper.—It was said by the Supreme Court of Arkansas: “It may be stated, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signature to commercial paper unless the authority is expressly conferred by the charter or given by the board of directors. They have no inherent power to execute negotiable notes in the name of the corporation.”⁵⁴ This statement of the law may well be challenged. If the president and secretary, acting together, have not this authority, what officers have? Are business men to be told that they cannot safely take the promissory note of an ordinary trading corporation, executed by its president and secretary in its corporate name, without demanding in every case, a resolution of the directors authorizing them so to

⁴⁸ *Camacho v. Hamilton Bank Note &c. Co.*, 2 App. Div. (N. Y.) 369; s. c. 73 N. Y. St. Rep. 457; 37 N. Y. Supp. 725.

⁴⁹ *State v. McFarland*, (Tenn. Ch.) 35 S. W. Rep. 1007.

⁵⁰ *United Order v. Fitzgerald*, 59 Ill. App. 362.

⁵¹ *Dobson v. More*, 62 Ill. App. 435; s. c. 1 Chic. L. J. Wkly. 55.

⁵² *Ante*, § 8341.

⁵³ *Carney v. New York L. Ins. Co.*, 19 App. Div. (N. Y.) 160; s. c. 45 N. Y. Supp. 1103.

⁵⁴ *City Electric Street R. Co. v. First Nat. Exch. Bank*, 62 Ark. 33; s. c. 31 L. R. A. 535; 12 Nat. Corp. Rep. 58; 34 S. W. Rep. 89; opinion by Wood, J.

act?⁵⁵ On the contrary, the Supreme Judicial Court of Massachusetts hold that the *treasurer* of a business corporation has the implied power to sign promissory notes, in the ordinary course of the business of the corporation, so as to bind the corporation. The question was well considered, and two judges dissented.⁵⁶ In the opinion of the court, written by Barker, J., it is said: "Treasurers of business corporations usually have much more extensive powers [than those of municipal corporations], and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed, by virtue of his office, with power to act for the corporation in making, accepting, indorsing, issuing and negotiating promissory notes and bills of exchange, and that such negotiable paper, in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although, with reference to the corporation, it is accommodation paper."⁵⁷ In the absence of evidence to the contrary it is held that the president and manager of a corporation which is engaged in loaning money, and in buying and selling negotiable instruments, has authority, as such, to transfer by indorsement a promissory note made payable to the corporation.⁵⁸

§ 8560. **Interpretation of Various Instruments Conferring Powers.**— Authority to the president of a corporation to open an office for it, implies authority to purchase furniture for it.⁵⁹ Authority to the president to borrow a stated sum from some Eastern national bank implies authority to borrow a similar sum from a bank in Chicago, and to give the note of the corporation therefor.⁶⁰ Authority to the treasurer to collect a debt secured by a mortgage

⁵⁵ As to the power of corporate officers, by virtue of their offices, to make negotiable paper in the name of the corporation, see *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505; s. c. *Merrill v. Hurley*, 6 S. Dak. 592. An officer of a corporation having general authority to *sign checks* cannot bind the corporation by a check given in payment of goods furnished another and distinct corporation of which he was also an officer: *Georgetown Water Co. v. Central Thompson-Houston Co.*, 17

Ky. L. Rep. 1270; s. c. 34 S. W. Rep. 435; modified on rehearing in 17 Ky. L. Rep. 1274; s. c. 35 S. W. Rep. 636.

⁵⁶ *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505.

⁵⁷ *Ibid.*, at page 507; citing several cases.

⁵⁸ *Merrill v. Hurley*, 6 S. Dak. 593.

⁵⁹ *Cross v. Anglo-American Bkg. Co.*, 79 Hun (N. Y.) 1124; s. c. 29 N. Y. Supp. 960; 61 N. Y. St. Rep. 270.

⁶⁰ *First Nat. Bank of Chicago v. California Nat. Bank*, (Cal.) 35 Pac. Rep. 639.

implies authority to institute a suit to foreclose the mortgage.⁶¹ Where unsecured creditors of a corporation threaten to attack a mortgage made by it as fraudulent, and the directors instruct the president to do the best he can in the premises, this authorizes him to release the mortgage and to make an agreement with the attacking creditors that they will grant an extension of time to the corporation.⁶² Authority conferred upon the president of a corporation to borrow money for the corporation, carries with it authority to pledge its personal property to secure any money so borrowed.⁶³ A by-law of a corporation authorizing the treasurer to incur indebtedness in the regular course of business for supplies and merchandise, does not authorize him to *issue promissory notes* for such indebtedness.⁶⁴

§ 8561. What Powers Implied from Express Grants of Other Powers, and What Not.—If the directors are authorized by statute to borrow money, and by resolution of the stockholders to issue and dispose of bonds for such sums of money to be borrowed as the directors may think necessary for specific purposes, and to *sell* such bonds on the best terms they may be able to obtain for the same,—they may *pledge* the bonds as *collateral* for money borrowed for the purposes named.⁶⁵ A resolution of the directors of a corporation, by which the corporation delivers certain notes belonging to the corporation, to its treasurer as collateral security for an advance made by the treasurer to the corporation, does not authorize the treasurer to pledge them to secure a loan to himself, by making a general indorsement of the name of the corporation thereon; and the person taking them with the knowledge that the treasurer is negotiating them for his individual use, which use is presumptively unauthorized, takes them subject to any original equities affecting their consideration. He could not, therefore, recover from the corporation the face value of the notes, but could collect at most the amount due from the corporation to the original pledgee, the treasurer, and this only upon proof of

⁶¹ North Brookfield Sav. Bank v. Flanders, 161 Mass. 335; s. c. 37 N. E. Rep. 307.

⁶² Smith v. Wells Man. Co., 148 Ind. 333; s. c. 46 N. E. Rep. 1000.

⁶³ Quaker City Nat. Bank v. Gilleson, 18 Pa. Co. Ct. 557.

⁶⁴ Bangs v. National Macaroni Co., 15 App. Div. (N. Y.) 522; s. c. 44 N. Y. Supp. 546.

⁶⁵ Farmers & Co. v. Toledo & Co., 54 Fed. Rep. 759.

authority on the part of the pledgee to indorse the notes to a third person.⁶⁶

§ 8562. **Corporations Bound by Acts of Their De Facto Officers.**— In favor of the public, corporations are bound by the acts of those officers whom it permits to hold its offices, precisely as though they were officers *de jure*.⁶⁷ For example, a corporation cannot defend an action brought against it to recover on its promissory note, by showing that its treasurer, by whom it was executed, was not elected at an annual meeting called in accordance with the by-laws, where the treasurer held the office without protest or opposition from any source.⁶⁸

§ 8563. **Ministerial Officers May Have Longer Terms than the Directors.**— The term of the office of an attorney for a corporation is not necessarily limited to the terms of the directors, unless the governing statute so provides. It was so held where the governing statute limited the term of office of the directors to one year, but also provided that the terms of the other officers should be prescribed by the by-laws or articles of incorporation.⁶⁹

⁶⁶ Security Bank v. Kingland, 5 N. Gas Light Co., 159 Mass. 505; s. c. Dak. 263; s. c. 65 N. W. Rep. 697. 9 Bkg. L. J. 450; 34 N. E. Rep. 1083.

⁶⁷ Zearfoss v. Farmers &c. Institute, 154 Pa. St. 449; s. c. 26 Atl. Rep. 210. ⁶⁹ Germania Spar &c. Verein v. Flynn, 92 Wis. 201; s. c. 66 N. W. Rep. 109.

⁶⁸ Merchants' Nat. Bank v. Citizens'

CHAPTER CCXXVI.

LIABILITIES OF MINISTERIAL OFFICERS.

SECTION	SECTION
8566. When ministerial officers are liable for the torts of their subordinates.	8572. Contracts upon which officers are not personally liable.
8567. Statutory action in New York for "official misconduct," etc.	8573. Statutory penalty for refusing to allow stockholder to inspect the books.
8568. Officer helping himself to repay his advances.	8574. Liability of president for this and that.
8569. Frauds for which officers are personally liable.	8575. Liability of the secretary.
8570. Contracts upon which officers are personally liable.	8576. Accounting by the treasurer.
8571. Personal liability on contract executed on behalf of non-existent corporations.	8577. Auditor is an "officer" and liable for misfeasance in office.
	8578. Manager when not liable for mismanagement.

§ 8566. **What Ministerial Officers Are Liable for the Torts of Their Subordinates.**— Ministerial officers of corporations are not liable for the *torts* of the subordinate officers or agents,¹ unless they direct the commission of the tort;² or, knowing of the defalcations of subordinates or negligently ignorant of them, they in fact condone them and connive at them.³

§ 8567. **Statutory Action in New York for "Official Misconduct," "Misfeasance," Etc.**— In an action brought under a statute of New York giving a right of action against the officers of corporations for "official misconduct," the defendants cannot be compelled to account until proof has been made and a determination reached that they have been guilty of misconduct. The mere fact that it is shown that an officer is indebted to the corporation for moneys received by him from the corporation to his own use, does not

¹ 3 Thomp. Corp., § 4097.

³ Latimer v. Veader, 20 App. Div.

² Favorite v. Cottrill, 62 Mo. App. (N. Y.) 418; s. c. 46 N. Y. Supp. 823. 119.

justify the court in directing the defendant to account.⁴ It cannot escape attention that such statutes, so construed, become a mere obstruction to justice. On the other hand, the "misfeasance," which, under an English statute,⁵ will render an officer liable, covers every species of misconduct by the officer, as such, for which he might, apart from the statute, have been sued, and includes an *auditor* who, knowingly or through failure to use reasonable skill and care, certifies accounts which should not have been certified, where the direct result is pecuniary damage to the corporation.⁶ He is not, however, liable for relying on the statement of the manager with regard to a matter not within his own sphere of duty, which resulted in the payment of an improper dividend.⁷ But such an auditor is bound to take reasonable care that what he certifies to the shareholders as the condition of the company is true. For example, he is liable to make good to shareholders the amount of a *dividend* declared out of *capital* instead of *income*, in consequence of a report stating merely that the value of the assets was dependent upon realization, while he presented a report to the directors calling attention to the insufficiency of the securities in which the capital was invested.⁸

§ 8568. **Officer Helping Himself to Repay His Advances.**—Where an officer of a corporation has advanced money to it, it is not wrongful for him to withdraw from the funds of the corporation, when its treasury will permit, enough money to reimburse himself, and such an act does not expose him to a statutory action for official misconduct.⁹

§ 8569. **Frauds for which Officers Are Personally Liable.**—On a principle already stated,¹⁰ the officers of a corporation cannot escape liability for *frauds* committed by them to the injury of

⁴ *Stokes v. Stokes*, 91 Hun (N. Y.) 605; s. c. 36 N. Y. Supp. 350; 71 N. Y. St. Rep. 187.

⁵ English Companies (Winding-up) Act, 1890, § 10.

⁶ *Re Kingston Cotton Mill Co.*, (No. 2) (1896) 1 Ch. 331; s. c. 65 L. J. Ch. (N. S.) 290; 73 Law T. Rep. 745; rev'd in (C. A.) (1896) 2 Ch. 279; s. c. aff'd on this point, (C. A.) (1896) 2 Ch. 279; s. c. 65 L. J. Ch. (N. S.) 673; 74 Law T. Rep. 568.

⁷ *Re Kingston Cotton Mill Co.*, (C. A.) (1896) 2 Ch. 279; s. c. 65 L. J. Ch. (N. S.) 673; 74 Law T. Rep. 568.

⁸ *Re London &c. Bank* (No. 2), (C. A.) (1895) 2 Ch. 673; s. c. 64 L. J. Ch. (N. S.) 866; 73 Law T. Rep. 304.

⁹ *Stokes v. Stokes*, 91 Hun (N. Y.) 605; s. c. 36 N. Y. Supp. 350; 71 N. Y. St. Rep. 187.

¹⁰ 3 Thomp. Corp., §§ 4097, 4107, 4108; 4 Id., § 4669.

third persons, any more than for other *torts* committed against third persons, on the ground of the liability of the corporation; since the fact that the corporation may also be liable has merely the effect of putting the corporation and the officers on the footing of *joint tort-feasors*. For example, the officers of a corporation cannot escape individual responsibility for *false statements* as to bonds issued by the corporation on the ground that they were acting for the corporation.¹¹ Therefore, a purchaser in good faith, before maturity, of *second mortgage bonds* issued by a corporation, who relies upon a statement on their face that they are "*first debenture bonds*," and is injured thereby, may recover the actual damage sustained, from the officers of the corporation, who issued the bonds with the intention that such statement should be acted on as true by any person who might thereby be induced to purchase them.¹²

§ 8570. Contracts upon which Officers Are Personally Liable.—

The president of a corporation who, without authority, signs a note in the name of such corporation, is personally liable for its amount upon an *implied warranty* that he was authorized to execute the same,¹³ upon the theory of a breach of warranty of agency.¹⁴ The president of a mining company is liable for lumber

¹¹ Bank of Atchison County v. Byers, 139 Mo. 627; s. c. 41 S. W. Rep. 325; 7 Am. & Eng. Corp. Cas. (N. S.) 52.

¹² Bank of Atchison County v. Byers, 139 Mo. 627; s. c. 41 S. W. Rep. 325; 7 Am. & Eng. Corp. Cas. (N. S.) 52. That an action will not lie by a judgment creditor of a corporation to obtain a personal judgment against its president, *another judgment creditor*, on the ground that his judgment was fraudulent: Westfall v. Powell, 57 Kan. 911 (app'x.); s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 141; 45 Pac. Rep. 92. Personal liability of officers of corporation who induce others to purchase shares therein on assurance that the purchase money will be used to obtain the disclosure of an alleged secret process, which does not in fact exist, and who loan the money to the corporation to be used for other purposes, largely for the benefit of such officers,—see Moore v. Robertson, 43 N. Y. St. Rep.

245; s. c. 17 N. Y. Supp. 554. One who signs as officer a certificate purporting to be of paid-up stock in a bank represents to all the world that he is such officer, that the bank is in existence, that the person to whom the certificate is issued is entitled thereto, that the stock is fully paid for, and that the certificate is what it purports to be. He is consequently liable to any one injured by false statements, although he delivers the certificate to the proposed cashier for the purpose of procuring a loan from one having full knowledge of the facts, but the cashier procures a loan from one without such knowledge: Merchants' Nat. Bank v. Robison, 8 Utah, 256; s. c. 7 Bkg. L. J. 308; 30 Pac. Rep. 985.

¹³ Miller v. Reynolds, 92 Hun (N. Y.) 400; s. c. 36 N. Y. Supp. 660; 71 N. Y. St. Rep. 574.

¹⁴ 1 Thomp. Corp., §§ 218, 417; 3 Id., § 2969, *et seq.*; 3 Id., § 4135.

sold to him to be used in the construction of a mill on a mine owned by the company, where he did not inform the seller that he was acting as the president or agent of such company, or that it was the owner of such mine, and the seller dealt with him as owner and as principal in the transaction.¹⁵

§ 8571. Personal Liability on Contracts Executed on Behalf of Non-existent Corporations.—It is not essential to the personal liability of persons who assume to execute an instrument in the name of a corporation which in fact has no legal existence, that they should have been guilty of actual moral fraud. The liability rests upon breach of warranty of agency.¹⁶

§ 8572. Contracts upon which Officers Are not Personally Liable.—In the absence of statutes providing otherwise, or of special circumstances changing the rule, the officers of a corporation through whom its contracts are made, are not personally liable to make good those contracts to the other party to them; and the same immunity applies to stockholders.¹⁷ The officers of a corporation do not necessarily render themselves personally liable for inducing third parties to enter into contracts which are *ultra vires* the corporation. The other contracting party is charged by the theory of the law with knowledge of the powers of the corporation; the contracting officers may make an innocent mistake as to the extent of the powers of the corporation which they represent; and, under the operation of the principle that the corporation cannot keep the fruits of the contract and repudiate it, no injustice will be done.¹⁸ One who signs his name to a note *after the name of a corporation*, with the addition of the term "Pres." or

¹⁵ *Bradford v. Woodworth*, 108 Cal. 684; s. c. 41 Pac. Rep. 797.

¹⁶ *Lagrone v. Timmerman*, 46 S. C. 372, 409; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 510; 26 Ins. L. J. 15; 24 S. E. Rep. 290.

¹⁷ *Hetfield v. Addicks*, 154 Pa. St. 1; s. c. 32 W. N. C. (Pa.) 162; 26 Atl. Rep. 215; *Imhoff v. House*, 36 Neb. 28; s. c. 53 N. W. Rep. 1032; *Hepner v. Maybury*, 23 Misc. (N. Y.) 262; s. c. 51 N. Y. Supp. 170. It has been held that the president of a corporation who, as such, sold corporate stock and turned over the proceeds to the corporation is not liable to the pur-

chaser for the purchase price, upon a rescission of the contract for fraudulent representations of the corporation and its president, which induced the purchase; since the action is in the nature of an action for money had and received, and the corporation, and not the president, received the money: *Zimmele v. American Plaster-Board Co.*, 1 App. Div. (N. Y.) 327; s. c. 72 N. Y. St. Rep. 543; 37 N. Y. Supp. 183.

¹⁸ *Linkauf v. Lombard*, 137 N. Y. 417; s. c. 20 L. R. A. 48; 51 N. Y. St. Rep. 63; 33 N. E. Rep. 472.

"Sec'y" will not be held personally liable where it appears that such note is the obligation of the corporation, and that the one signing the note had authority to bind the corporation, although a proper formality would have required him to sign the corporate name "by A. B., President," or "by A. B., Sec'y."¹⁹

§ 8573. **Statutory Penalty for Refusing to Allow Stockholder to Inspect the Books.**—Statutes have frequently been enacted imposing *penalties* upon officers of corporations for refusing to allow *stockholders* to inspect the corporate books and records.²⁰ There are also statutes giving this right of inspection to *creditors* and imposing penalties upon officers of the corporation for refusing to allow it.²¹ A demand upon the proper officer and a refusal by him will support the action, although made outside of the office of the corporation.²² A general demand for an inspection of *all* the books, which has been refused, is not sufficient to support an action for the penalty for refusing an inspection of the *stock-book* merely.²³ A denial of the statutory right of inspection is sufficient to support the action for the penalty: no actual damage need be shown.²⁴ It is no defense on the part of the officer that the stock-book, the inspection of which is desired, does not conform in all respects to the requirements of the statute.²⁵ A building association is a joint stock corporation within the meaning of such a statute.²⁶

§ 8574. **Liability of President for This and That.**—The president of a corporation, who has complete control of its business, is liable to a stockholder for a sum lost by the corporation in consequence of allowing a debt to a concern with which he was closely connected to accumulate until it became insolvent, where the debt could have been saved if the president had not so acted.²⁷ The

¹⁹ Fisk v. Carbonized Stone Co., 67 Ill. App. 327.

²⁰ 4 Thomp. Corp., § 4407, *et seq.*

²¹ Such as New York Laws 1890, p. 564, § 29, amended by N. Y. Laws 1892, p. 688.

²² Buker v. Steele, 43 N. Y. Supp. 346.

²³ Buker v. Steele, 43 N. Y. Supp. 346.

²⁴ Buker v. Steele, 43 N. Y. Supp. 346.

²⁵ Buker v. Steele, 43 N. Y. Supp. 346.

²⁶ Buker v. Steele, 43 N. Y. Supp. 346. The penalty provided by the N. Y. Stock Corporation Law, § 53, for the refusal of a corporate officer to permit a stockholder to inspect the company's *stock-book*, will not be inflicted on one who stated that the book was not on hand at the time, where such person was not an officer within the intendment of the law: Greene v. Shain, 22 Misc. (N. Y.) 720; s. c. 49 N. Y. Supp. 1061.

²⁷ Doe v. Northwestern Coal &c. Co., 78 Fed. Rep. 62.

president of an irrigation company is liable in damages as a *trespasser* for constructing its irrigation ditches in a highway in such a manner as to trespass upon the rights of an abutting land-owner, although he acts at the instance of the company.²⁸ On the other hand, the president of a corporation is not liable for failing to defend a suit brought against the corporation upon a just claim to which it has no defense.²⁹ The *president* of a corporation, to whom a bond has been delivered by the board of directors in trust to be sold, has no right to convert such bond to his own use, in payment for a claim due him from the corporation, without the consent of the directors; and he may be compelled, in an equitable action, to surrender it.³⁰

§ 8575. **Liability of the Secretary.**— The secretary of a corporation is absolutely bound to surrender the books of the corporation upon the expiration of his term of office, and cannot hold on to the books until his accounts have been adjusted; but his duty to surrender them will be enforced by *mandamus*.³¹

§ 8576. **Accounting by the Treasurer.**— The treasurer of an incorporated club cannot escape his obligation to account to the club for moneys received by him, on the ground that the money came into his hands as a result of work done or sales made *on Sunday*, in violation of the Sunday law, and that such work done or sales

²⁸ Bates v. Van Pelt, 1 Tex. Civ. App. 185; s. c. 20 S. W. Rep. 949. For the governing principle, see 5 Thomp. Corp., § 6288.

²⁹ Boston Tailoring House v. Fisher, 59 Ill. App. 400. President of a corporation not personally liable for indorsements made in name of corporation known to be made for *accommodation* merely: Louisville Bkg. Co. v. Eisenman, 14 Ky. L. Rep. 710; s. c. 21 S. W. Rep. 1049; denying rehearing in 19 L. R. A. 684; s. c. 14 Ky. L. Rep. 705; 40 Am. & Eng. Corp. Cas. 243; 21 S. W. Rep. 531; 7 Am. R. & Corp. Rep. 569. When president not liable on written promise to pay wages to employé of corporation, the same having been given without consideration: Schisgal v. Wronkow, 18 Misc. (N. Y.) 445; s. c. 42 N. Y. Supp. 43. Circumstances under which the president of a mutual benefit corpora-

tion is liable for the conversion of its funds: McClure v. Levy, 79 Hun (N. Y.) 235; s. c. 60 N. Y. St. Rep. 565; 29 N. Y. Supp. 352; s. c. aff'd, 147 N. Y. 215.

³⁰ Greenville Gas Co. v. Reis, 54 Ohio St. 549; s. c. 44 N. E. Rep. 271. Directors not liable because a conditional contract made with the corporation was forfeited for want of means to save it: Hart v. Ogdensburg & c. R. Co., 89 Hun (N. Y.) 316; s. c. 35 N. Y. Supp. 566; 70 N. Y. St. Rep. 226.

³¹ State v. Davis, 54 Mo. App. 447. Secretary failing to deliver sworn list of non-resident stockholders with value of their shares, as required by Connecticut statutes, liable for statutory penalty, but not liable as a tax debtor: State v. Royce, 68 Conn. 311; s. c. 36 Atl. Rep. 48.

made were illegal and *ultra vires*, or on the ground that the charter of the club was *fraudulently procured*.³²

§ 8577. Auditor Is an "Officer" and Liable for Misfeasance in Office.— An auditor of a limited company, appointed under articles of association which require him to report to the members as to the accounts of the directors, is an "officer" of the company within an English statute,³³ against whom proceedings may be taken by a receiver for misfeasance in office;³⁴ but a mere *locum tenens* of the office, who does the auditor's work without ever having been appointed to the office, is not.³⁵

§ 8578. Manager When Not Liable for Mismanagement.— A corporation cannot recover from the active *manager* thereof, for losses caused by his improvidence and wastefulness, where, before acting in all the transactions, he submitted the matter to the board of directors, and obtained their direction to act in the manner contemplated.³⁶

³² Haacke v. Knights of Liberty Social &c. Club, 76 Md. 429; s. c. 25 Atl. Rep. 422. To what credits the treasurer of a corporation is entitled on an accounting: Mechanics' Institute v. Firth, 49 Pac. Rep. 214.

³³ Companies (Winding-up) Act 1890, § 10.

³⁴ Re Kingston Cotton Mill Co., (C. A.) (1896) 1 Ch. 6; s. c. 65 L. J. Ch. (N. S.) 145; 73 Law T. Rep. 482.

³⁵ Re Western Counties Steam Bakeries &c. Co., (C. A.) (1897) 1 Ch.

617; s. c. 66 L. J. Ch. (N. S.) 354; 75 Law T. Rep. 648; 76 Law T. Rep. 239. When auditor justified in relying upon certificate of manager as to condition of company, and not liable for *dividends* wrongfully paid: Re Kingston Cotton Mill Co., (C. A.) (1896) 2 Ch. 279; s. c. 65 L. J. Ch. (N. S.) 673; 74 Law T. Rep. 568.

³⁶ Boyle v. Staten Island &c. Land Co., 17 App. Div. (N. Y.) 624; s. c. 45 N. Y. Supp. 496.

CHAPTER CCXXVII.

COMPENSATION OF OFFICERS.

SECTION	SECTION
8581. Officers presumed to serve without compensation.	8584. Voting compensation for past services.
8582. Rule does not apply in case of extra services clearly outside the duties of the office.	8585. Directors voting compensation to themselves.
8583. The question considered with reference to particular officers.	8586. Resignation terminates salary.

§ 8581. Officers Presumed to Serve without Compensation.—

In the absence of some provision in the articles of incorporation, in the by-laws, or in some resolution of the board of directors legally passed, the general rule is that the president and other officers of private corporations are presumed to serve without compensation, and cannot maintain an action against the corporation to recover compensation for their official services.¹ But the payment by a corporation to one of its officers of a salary greater than that authorized by its by-laws is not *ultra vires* the corporation, but is merely *ultra vires* the directors, in the sense of being a breach of trust against the stockholders, at whose election it is voidable in the absence of circumstances of ratification or estoppel.² On the contrary, it may be cured by the *acquiescence* of the *stockholders*. Thus, a managing director of an English company was not liable to

¹ *Brown v. De Young*, 167 Ill. 549; s. c. 47 N. E. Rep. 863; aff'g s. c. 66 Ill. App. 212; *Crumlish v. Central Improv. Co.*, 38 W. Va. 390; s. c. 23 L. R. A. 120; 18 S. E. Rep. 456 (treasurer and secretary who is also a director); *Chicago Porter Home Invest. Co. v. Biddison*, 46 Ill. App. 423; *Remmers v. Seky*, 70 Mo. App. 364; *Blue v. Capital Nat. Bank*, 145 Ind. 518; s. c. 43 N. E. Rep. 655 (vice-president). A stockholder and officer in a corporation who renders valuable services in enlarging the market for its products cannot be allowed compensation where, at the time of rendering such service, he did not expect to be paid therefor except as he might reap a profit from the enhancement in value of his stock: *Ritchie v. McMullen*, 79 Fed. Rep. 522; s. c. 47 U. S. App. 470; 25 C. C. A. 50.

² *Brown v. De Young*, 167 Ill. 549; s. c. 47 N. E. Rep. 863; aff'g 66 Ill. 212.

account to the corporation for the amount of a reasonable salary drawn by him without the authority of any resolution or without any specified notice to the stockholders, where the item appeared in the accounts and every stockholder knew or had means of knowing the fact.³ This does not exclude the conclusion that the payment of salaries to corporate officers may take place under such circumstances that it will be a *wrong to creditors* of the corporation,—in which case, on principle, the *acquiescence* of the shareholders will not condone the wrong.

§ 8582. Rule Does not Apply in Case of Extra Services Clearly Outside the Duties of the Office.—The foregoing rule does not apply in the case where a director or other officer of a corporation renders extra services which are clearly outside the duties of his office; but he may recover the reasonable value of such services as upon a *quantum meruit*,⁴ where they were rendered under such circumstances as to raise an implied promise on the part of the corporation to pay for them,⁵ especially if it was understood by the other officers of the corporation that the services were to be performed by him and paid for by the corporation,⁶ and the rate of compensation is conceded.⁷ This rule has been applied where services were rendered by the vice-president of a mining company, who was also a director, as its *superintendent*;⁸ and for such services compensation may be voted after the services have been rendered, provided the vote of the officer rendering the services is not necessary to carry the resolution.⁹ Where the services are meritorious, protracted, and presumptively outside the duties of the office, a promise on the part of the corporation to pay for them need not be sought for in a formal resolution of the board of directors, but may be *proved by circumstances*, such as conversations and statements made at meetings of the board of directors, with the

³ Hadley v. Hadley, (Ch.) 77 Law T. Rep. 131.

⁴ Mitchell v. Holman, 30 Or. 280; s. c. 47 Pac. Rep. 616; Severson v. Bimetallic Extension Min. &c. Co., 18 Mont. 13; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 383; 44 Pac. Rep. 79; Felton v. West Iron Mountain Mining Co., 16 Mont. 81; Sargent v. Sargent Granite Co., 3 Misc. (N. Y.) 325; s. c. 52 N. Y. St. Rep. 517; 23 N. Y. Supp. 886; s. c. reversed on another point, 6 Misc. 384; s. c. 56 St. Rep. 385; 26 N. Y. Supp. 737.

⁵ Corinne Mill &c. Co. v. Toponce, 152 U. S. 405; s. c. 38 L. ed. 493; 14 Sup. Ct. Rep. 632.

⁶ Severson v. Bimetallic Extension Mining &c. Co., *supra*.

⁷ Sargent v. Sargent Granite Co., *supra*.

⁸ Severson v. Bimetallic Extension Min. &c. Co., *supra*; Harris v. Lemming-Harris Agri. Works, (Ch. App. Tenn.) 43 S. W. Rep. 869.

⁹ Zellerbach v. Allenberg, 99 Cal. 57; s. c. 33 Pac. Rep. 786.

acquiescence of the members of the board. This will *take the question to the jury* whether there was a contract on the part of the corporation to pay for them.¹⁰

§ 8583. The Question Considered with Reference to Particular Officers.—Where a person has been induced to serve as director of a company in consideration of a fixed salary, it is no defense to an action therefor that, after his election, he made promises to the stockholders that the corporation would be a great success, which promises were not realized.¹¹ But where the president of a corporation acts as its general manager at a fixed salary, and the by-laws provide that, upon his inability or death, his office shall devolve upon the *vice-president*, then, if the president dies and the vice-president succeeds to the office in fact, and discharges its duties, though without being elected to it,—he becomes entitled to the salary attached to it.¹²

§ 8584. Voting Compensation for Past Services.—Where meritorious services have been rendered to a corporation by its officers,

¹⁰ Bagley v. Carthage &c. R. Co., 25 App. Div. (N. Y.) 475; s. c. 49 N. Y. Supp. 718. That a *by-law* fixing the salary attached to a certain office at a given amount may be modified by a parol agreement followed by acquiescence fixing it at a less amount,—see Bowler v. American Box Strap Co., 22 Misc. (N. Y.) 335; s. c. 49 N. Y. Supp. 153.

¹¹ Paducah Land &c. Co. v. Hays, 15 Ky. L. Rep. 517; s. c. 24 S. W. Rep. 237.

¹² Funsten v. Funsten Commission Co., 67 Mo. App. 559. A *director* appointed by the board of directors to act as *secretary* of the corporation is entitled to a reasonable compensation for his services as such officer, though there was no express provision at the time of his appointment that he should be paid, and no compensation for the secretary is stated in the by-laws, if it was clearly the intention of both parties that he should be paid: Dalton v. Brush Electric Light Co., 13 Ohio C. C. 505. This somewhat doubtful decision cites: Rogers v. Hastings &c. R. Co., 22 Minn. 25; Garden v. Butler, 30 N. J. Eq. 702, 723; Pew v. Gloucester First Nat. Bank, 130

Mass. 391, 395. See, *contra*, Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118; Holder v. Lafayette &c. R. Co., 71 Ill. 106; Mather v. Eureka Mower Co., 118 N. Y. 629. It distinguishes Smith v. Long Island R. Co., 102 N. Y. 190. The theory of the Ohio decision is that, to act as *secretary* is to perform services "extra" the office of director; but the court overlooks the fact that the secretary and other ministerial officers of corporations are in general directors, and that the principle stated at the commencement of this chapter denies compensation except for services which are "extra" the office of president, secretary, treasurer, or other ministerial officer. The shareholders of a corporation do not, by ratifying the act of the directors authorizing the issue of bonds, thereby *ratify* the illegal action of the directors in fixing a salary for the *secretary*, which was done at the time the bonds were issued, where nothing is said about salary at the ratification, although the minutes of the directors are before the shareholders: Martin v. Santa Cruz Water Storage Co., (Ariz.) 36 Pac. Rep. 36.

circumstances may exist in which a subsequent resolution of the directors, by which such officers are awarded compensation for such services, will be upheld, though possibly a recovery could not be had for such services, but for the resolution.¹³ If an attempt were made to support this conclusion on the mere footing of contract, it might fail; since a promise to pay for past services, for which there was no legal obligation to pay, might be regarded as a promise without consideration. But the conclusion more properly rests on the footing of that *discretionary* control of the directors over the officers of the corporation, which, in the absence of fraud or abuse, will not be controlled by the courts.¹⁴

§ 8585. **Directors Voting Compensation to Themselves.**—Under a principle already stated,¹⁵ the directors of a corporation presumptively serve without salaries. As fiduciaries, they are bound to those beneficially interested in their trust to exercise the utmost good faith, and this is incompatible with the conclusion that they are at liberty to vote themselves salaries for their services as directors.¹⁶ The principle about to be stated, that a resolution of the board of directors to pay any of the board a salary for acting in some other official position, or rendering some other services for the corporation, is invalid, where his vote, or the votes of members under his control, are necessary to the passage of the resolution,—precludes the conclusion that directors can, under any circumstances, vote themselves salaries as directors merely; since in such a case *every director* is interested, and the vote of every member cast for the resolution is vitiated by his interest. With reference to a resolution of the board of directors fixing the salaries of ministerial

¹³ Zellerbach v. Allenberg, 99 Cal. 57; s. c. 33 Pac. Rep. 786.

¹⁴ A resolution by the board of directors of a corporation that the salary of the president be fixed at a specified amount per year, "salary to date from" a specified date more than two years before, entitles the president to such salary after the date of the resolution, where the corporation constantly recognizes its liability thereafter, although the salary prior to that date was with the consent of all parties appropriated to the uses of the company: McGowan v. Lincoln Park Co., 181 Pa. St. 55.

¹⁵ *Ante*, § 8581.

¹⁶ Doe v. Northwestern Coal & Co., 78 Fed. Rep. 62. To the same effect, see Zellerbach v. Allenberg, 99 Cal. 57; Bennett v. St. Louis Car Roofing Co., 19 Mo. App. 349; Ward v. Davidson, 89 Mo. 445; Gardner v. Butler, 30 N. J. Eq. 702; Miner v. Belle Isle Ice Co., 93 Mich. 97; 17 L. R. A. 412; Butts v. Wood, 37 N. Y. 317; Kelsey v. Sargent, 40 Hun (N. Y.) 150; Blatchford v. Ross, 54 Barb. (N. Y.) 42, 48; Maux Ferry Gravel Road Co. v. Branegan, 40 Ind. 361; Accommodation Loan & Sav. Fund Assn. v. Stonementz, 29 Pa. St. 534. But compare McNab v. McNab & Co., 62 Hun (N. Y.) 18.

officers of the corporation, the recent holdings are to the effect that such a resolution is invalid where the only directors voting upon it are officers favorably affected by its provisions;¹⁷ where a resolution authorizing the payment of a salary to the president for *past services* rendered without any provision for a salary, was adopted at a meeting of directors consisting of himself, his son, and the secretary of the company, who was entirely under his control;¹⁸ where a director, by his own vote and the vote of others representing his interest in the board, voted himself an exorbitant salary;¹⁹ where a majority of the *stockholders* voted salaries unreasonably large for the different corporate offices, and afterwards had themselves elected thereto.²⁰ But a resolution of the directors fixing the salary of an officer is not invalid because the officer in question voted in favor of it, where his vote was not necessary to the adoption of the resolution.²¹ Nor does the fact that one part of such a resolution may be invalid because it fixes the salary of an officer who voted for it, invalidate another portion which fixes the salary of another officer.²² Moreover, such a resolution may be ratified and confirmed at a subsequent meeting of the board by a competent vote, and will then become as valid as though the original vote had been a lawful one.²³

§ 8586. **Resignation Terminates Salary.**—An unconditional resignation of an office to which a salary is attached, followed by a vacation of the office and turning it over to his successor, of course terminates all further right to the salary.²⁴

¹⁷ Remmers v. Seky, 70 Mo. App. 364.

¹⁸ Doe v. Northwestern Coal &c. Co., 78 Fed. Rep. 62.

¹⁹ Harris v. Lemming-Harris Agri. Works, (Ch. App. Tenn) 43 S. W. Rep. 869.

²⁰ Decatur Mineral &c. Co. v. Palm, 113 Ala. 531; s. c. 21 South. Rep. 315; 14 Nat. Corp. Rep. 277; 6 Am. & Eng. Corp. Cas. (N. S.) 558.

²¹ Funsten v. Funsten Commission Co., 67 Mo. App. 559; Clark v. American Coal Co., 86 Iowa, 436; s. c. 17 L. R. A. 557.

²² Funsten v. Funsten Commission Co., 67 Mo. App. 559.

²³ Wickersham v. Crittenden, 110 Cal. 332; s. c. 42 Pac. Rep. 893.

²⁴ Merrill v. Wakefield Rattan Co., 1 App. Div. (N. Y.) 118; s. c. 37 N. Y. Supp. 64; 72 N. Y. St. Rep. 217.

TITLE TWENTY-FIVE.

RECENT DECISIONS ON STOCK AND
STOCKHOLDERS.

TITLE TWENTY-FIVE.

RECENT DECISIONS ON STOCK AND STOCK-HOLDERS.

CHAPTER.

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CHAPTER CCXXVIII.

STOCK AND STOCKHOLDERS.

- | SECTION | SECTION |
|--|---|
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| 8591. Power of a corporation to mortgage or pledge its uncalled capital. | 8598. Share certificate not necessary to make one a shareholder, but corporation must be able to issue one. |
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§ 8590. Propriety and Necessity of Share Ownership.—A corporation aggregate may exist without share ownership, even where it

is organized for business purposes. In the absence of any restriction in the charter or governing statute, a valid membership may be established in a corporation created for business purposes by an agreement among the members that, instead of issuing shares, their rights in the capital stock shall pass with the corporate property and privileges. Such a corporation is valid, and is not dissolved by the death of its original members.¹ On the other hand, in England the articles of a company limited by guaranty, and not having a capital divided into shares, may provide for a division of the interests of the members into transmissible shares.²

§ 8591. Power of a Corporation to Mortgage or Pledge Its Uncalled Capital.— This question has been several times considered in England with reference to the provisions of the various Companies Acts. The question has been whether a mortgage or charge attempted to be made by a company upon its uncalled capital is valid as against, and confers a priority over, the ordinary creditors of the company in a winding-up proceeding. This power has been affirmed in respect of a company organized under the Companies Act 1862,³ under articles of association broad enough to confer it;⁴ but has been more recently denied under section 5 of the Companies Act 1879.⁵

§ 8592. Pledging the Voting Power of Shares.— The pledging of the voting power of shares as security for the payment of bonds issued by a corporation, is not opposed to a sound public policy.⁶

§ 8593. Power to Issue Preferred Stock.— In organizing a corporation, the adventurers may classify its stock and provide for a preference of one class over another in respect of both capital and dividends, in the absence of a prohibition in the charter or governing statute.⁷ It cannot escape attention that this is a question in

¹ *McGinty v. Athol Reservoir Co.*, 155 Mass. 183; s. c. 29 N. E. Rep. 510.

² *Malleon v. General Mineral Patents Syndicate*, (1894) 3 Ch. 538.

³ *Re Pyle Works*, 44 Ch. Div. 534.

⁴ *Newton v. Anglo-Australia &c. Co.*, (1895) A. C. 244.

⁵ *Re Mayfair Property Co.*, (C. A.) (1898) 2 Ch. 28; s. c. 78 Law T. Rep. 302; aff'g 77 Law T. Rep. 652.

⁶ *United States Water Works Co. v. Omaha Water Co.*, 21 Misc. (N. Y.)

594; s. c. 48 N. Y. Supp. 817; s. c. aff'd, 29 App. Div. (N. Y.) 630.

⁷ *Hamlin v. Toledo &c. R. Co.*, 78 Fed. Rep. 664, 670; s. c. 24 C. C. A. 271; 36 L. R. A. 826; 47 U. S. App. 422. As to the right to issue preferred stock, see *Re Dido Pier Co.* (1891) 2 Ch. 354; *Eichbaum v. City of Chicago Grain Elevators*, (1891) 3 Ch. 459; *Havemayer v. Bordeaux*, 8 Nat. Corp. Rep. 127; *Higgins v. Lansingh*, 154 Ill. 301; *Re Bridgewater Nav.*

which the public are not interested, but which merely concerns the rights of the common shareholders, whose rights to dividends are postponed in favor of those shareholders who are thus preferred.⁸ Although the charter or governing statute may not confer in express terms the power to issue preferred stock, yet where it has been issued by *unanimous consent*, that is, by the original authority or consent of the shareholders, or where, without such original authority or consent, its issue has been ratified by them by long acquiescence or otherwise, it will be deemed a valid issue.⁹ Where a corporation, whose stock is divided into common and preferred shares, is authorized by statute to increase its capital, and the statute is silent as to the class to which the increased stock shall belong, it will be presumed that the legislature meant that it was to be common stock.¹⁰ In England, a limited company, having no authority under its memorandum or articles of association to create any preference between different classes of shares, may, by special resolution, alter its articles so as to authorize the issuance of preferred shares by way of an increase of capital.¹¹

§ 8594. Validity of Issues of Shares when Not Questionable.—

The validity of stock which has been dealt in for thirty years as valid, and upon which annual dividends have been paid without any intimation that its validity will be challenged, cannot be questioned thereafter, by reason of laches.¹² A contention that the capital stock or business feature of a certain religious corporation is of no effect, and may be disregarded because foreign to the ob-

Co., 39 Ch. Div. 1; *Campbell v. American Zylonite Co.*, 122 N. Y. 455; s. c. 11 L. R. A. 596; 2 Thomp. Corp., § 2236, *et seq.*

⁸ That a corporation may issue preferred stock if all the stockholders give their consent, although there is no authority therefor by statute or in its charter,—see *Havemayer v. Bordeaux Co.*, 8 Nat. Corp. Rep. 127.

⁹ *Higgins v. Lansingh*, 154 Ill. 301; s. c. 40 N. E. Rep. 362.

¹⁰ *Jones v. Concord & c. R. Co.*, (N. H.) 30 Atl. Rep. 614.

¹¹ *Andrews v. Gas Meter Co.*, (C. A.) (1897) 1 Ch. 361; s. c. 66 L. J. Ch. (N. S.) 246; 76 Law T. Rep. 132; overruling *Hutton v. Scarborough Cliff Hotel Co.*, 2 Dr. & Sm. 521. This decision seems to overrule *Andrews v. Gas Meter Co.*, (Ch.) 75 Law T. Rep.

267, which follows *Hutton v. Scarborough Cliff Hotel Co.*, *supra*. It seems also to have overruled *Re Hyderabad (Deccan) Co.*, 75 Law T. Rep. 23, which follows *Hutton v. Scarborough Cliff Hotel Co.*, *supra*. A provision in certificates of "preferred, non-voting, capital stock," that if the holder fails to avail himself of the privilege of converting it into common stock within a specified time, it shall "become preferred 4 per cent. non-cumulative stock," does not show that it was not preferred stock before the rejection of the option: *Hamlin v. Toledo & c. R. Co.*, 78 Fed. Rep. 664; s. c. 47 U. S. App. 422; 36 L. R. A. 826.

¹² *Foster v. Belcher's Sugar Ref. Co.*, 118 Mo. 238; s. c. 24 S. W. Rep. 63.

ject of its charter and contrary to the State Constitution and laws governing such corporations, can be raised only by direct proceedings by the State, and not in a proceeding involving the validity of certain transfers of corporate shares by a stockholder to the corporation, alleged to have the effect of defrauding the stockholder's creditors.¹³

§ 8595. **Corporation Cannot Make Its Shares a Lien upon Its Property.**—The power to issue preferred shares does not include the power to make such shares a lien upon its property,—the true conception of preferred shares being that they merely create a preference in the declaration and payment of dividends out of the income.¹⁴ For the creation of a lien upon the property of the corporation in favor of any one class of its shares, there must be a direct statutory authorization. Nor can an agreement between the shareholders and a subscriber to other shares of the corporation, make such shares a lien on its property, as against any parties in interest except the shareholders themselves. Such an agreement does not affect the rights of bondholders or general creditors, without notice of it at the time when their relations to the corporation were assumed.¹⁵

§ 8596. **Rights in the Distribution of Shares.**—If, for any valid reason, the corporation cannot issue shares which have been subscribed for, so that the subscriber cannot have a decree for specific performance, the subscriber may have alternative relief by way of damages for the value of the shares and the dividends which it has earned.¹⁶ A purchaser of stock in a corporation to be formed is not restricted, upon failure to issue the shares after payment therefor because the corporation is enjoined against it, to an action for damages for breach of the contract; but he may, after the expiration of a reasonable time, demand and recover back the money paid, with interest.¹⁷ One who contracts with the officers of a corporation in their *individual capacity* to do specified work for the corporation, in payment for which he is to receive a specified amount of the corporate stock, must look solely to such officers, and

¹³ St. George's Church Soc. v. &c. R. Co., 72 Fed. Rep. 92; s. c. 35 Branch, 120 Mo. 226; s. c. 25 S. W. Ohio L. J. 207.
Rep. 218.

¹⁴ 2 Thomp. Corp., § 2262.

¹⁵ Continental Trust Co. v. Toledo

¹⁶ Birmingham Nat. Bank v. Roden, 97 Ala. 404; s. c. 11 South. Rep. 883.

¹⁷ Rose v. Foord, 96 Cal. 152; s. c. 30 Pac. Rep. 1114.

cannot compel the corporation to issue such shares.¹⁸ A subscription for shares payable to a railroad company, "its associates, successors, or assigns," entitles the subscriber, in case of a valid sale by such company of its property and franchises to another company, upon payment of the subscription, to receive shares in the *successor company*.¹⁹ A corporation organized for the purpose of affording *terminal and depot facilities*, to the railroads entering a city, and required by its charter to refrain from discrimination, whose stock is held by the railroads availing themselves of its privileges, will be required to issue a proportionate share of its stock at par to a new railroad company desiring to enter the city, and not at a price proportionate to the enhanced value of its property and franchises; and in case it has not sufficient unissued shares, the several stockholders will be required to surrender or sell a portion of the shares held by them.²⁰

§ 8597. **Who is a Shareholder, and Who Not.**—Where the owner of property seized and sold by a banking corporation in the enforcement of calls secured by a mortgage on the property, is not the

¹⁸ Kelley v. Collier, 11 Tex. Civ. App. 353; s. c. 32 S. W. Rep. 428.

¹⁹ Chattanooga &c. R. Co. v. Warthen, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

²⁰ St. Paul Union Depot Co. v. Minnesota &c. R. Co., 47 Minn. 154; s. c. 13 L. R. A. 415; 10 Ry. & Corp. L. J. 290; 49 N. W. Rep. 646. As to corporations formed to afford terminal facilities to railway companies, see further,—King v. Barnes, 109 N. Y. 267; s. c. 10 Cent. Rep. 204; Pennsylvania Co. v. Ellett, 132 Ill. 654. That one whose name is included in a corporate charter without his authority, if to be regarded as a member of the company, must be allowed an opportunity of saying how many shares he will take,—see Halifax Carette Co. v. Moir, 28 N. S. 45. Circumstances under which a new corporation succeeding to the property and business of an old one will be compelled to issue shares to a member of one of the constituent companies, notwithstanding his indebtedness to other stockholders therein: Anthony v. American Glucose Co., 146 N. Y. 407; s. c. 41 N. E. Rep. 23. No obligation to issue stock certificate delivered to the treasurer of

the corporation upon a contract that the same should be delivered by him to certain contractors upon their completing certain work, when they fail to complete the work and become fugitives from justice; and such shares will be ordered to be surrendered up and canceled: Equity Gas Light Co. v. McKeige, 47 N. Y. St. Rep. 364; s. c. 19 N. Y. Supp. 914; s. c. aff'd, 139 N. Y. 237. Circumstances under which a corporation was adjudged to issue its shares in proportion to the amount subscribed by different subscribers, there not being enough to go around: Clark County v. Winchester &c. Rd. Co., 19 Ky. L. Rep. 1435; s. c. 43 S. W. Rep. 716. That a certificate of stock signed by one elected president of a Connecticut corporation, the charter of which provides for succession to the functions of a West Virginia corporation previously incorporated, but not for amalgamation with it, is not a certificate of the latter corporation which one who has contracted for such a certificate can be compelled to take,—see Craig Silver Co. v. Smith, 163 Mass. 262; s. c. 39 N. E. Rep. 1116.

owner of the shares and hence not personally bound to respond to the calls, the fact that he consents to have executory proceedings directed against himself as actual possessor of the land, instead of against the original subscriber to the shares and his heirs, and the further fact that, upon the judicial sale of the property, he becomes the purchaser for cash,—do not make him a shareholder in the bank and liable for future contributions; but the sale is a nullity, leaving the ownership of the shares in the heirs of the original subscriber.²¹

§ 8598. **Share Certificate Not Necessary to Make One a Shareholder, but Corporation must be Able to Issue One.**—The issuing of a share certificate is not necessary to make one a shareholder, and assessable as such and liable as such to creditors of the corporation, but the fact may be shown by other evidence.²² It is not necessary, to prove ownership of stock by one sued on his contract of subscription in which he agreed to pay his subscription “at such time and in such manner as may be determined by the board of directors of said corporation, to be hereafter chosen,” to show that a certificate was issued to him, because it is not due until his subscription is fully paid.²³ Therefore, the failure to detach certificates of stock from the books of a corporation does not prevent the person named therein from being a stockholder.²⁴ But before a corporation can recover in an action upon a subscription, it must be in a position to issue a proper certificate as contemplated by the contract; and this it cannot do where it has already issued to others certificates for all the shares which it is authorized to issue.²⁵

§ 8599. **One-Man Corporations.**—One person cannot conduct his ordinary business in the name of a corporation, under the statute of Kentucky,²⁶ which provides that “any number of persons may associate themselves together and become incorporated.”²⁷ The

²¹ Citizens' Bank v. Irvine, 46 La. An. 1158; s. c. 15 South. Rep. 373.

²² Baron v. Burrill, 86 Me. 66; s. c. 29 Atl. Rep. 939; Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627; s. c. 22 S. E. Rep. 90; Pacific Fruit Co. v. Coon, 107 Cal. 447; s. c. 40 Pac. Rep. 542.

²³ California Southern Hotel Co. v. Callender, 94 Cal. 120; s. c. 29 Pac. Rep. 859.

²⁴ Kimball v. Davis, 52 Mo. App. 194.

²⁵ Railroad v. Knoxville, 98 Tenn. 1, 16; s. c. 37 S. W. Rep. 883.

²⁶ Ky. Gen. Stat., ch. 56.

²⁷ Louisville Bank Co. v. Eisenman, 19 L. R. A. 684; s. c. 14 Ky. L. Rep. 705; 40 Am. & Eng. Corp. Cas. 243; 7 Am. R. & Corp. Rep. 569; 21 S. W. Rep. 531; rehearing denied in 14 Ky. L. Rep. 710; s. c. 21 S. W. Rep. 1049.

above proposition is affirmed by the Court of Appeals of Kentucky in the case just cited, and it is undoubtedly sound. But the court, after having affirmed it, proceeded immediately to contradict it. Although the sole owner of the stock of the corporation had no power under the statute law of Kentucky to conduct his ordinary business in that form, yet having chosen to do so, and having indorsed the name of the one-man corporation to certain drafts, he did not make himself personally liable on the drafts, but the corporation alone was liable.²⁸ In other words, he could not conduct his ordinary business in the name of a corporation, and yet he could.

§ 8600. **Corporation a Trustee for Its Shareholders.**—A corporation owning and operating an irrigating ditch under the Colorado statutes, becomes a trustee for its stockholders, and is bound to protect their interest.²⁹

§ 8601. **Stockholders Do Not Occupy Any Fiduciary Relation towards the Corporation or towards Each Other.**—They may deal with the corporation and with each other as strangers and at arm's-length, and make the best bargain for themselves which they can, provided they are guilty of no fraud. This, of course, is predicated of stockholders merely, who are not directors or managing officers. For example, the owner of a majority of the shares in a corporation stands under no duty or trust relation towards the minority stockholders which will prevent his purchasing bonds of the corporation sufficient in amount to compel the trustee to foreclose the mortgage so as to enable him to purchase the property upon foreclosure.³⁰ In the case just cited, the opinion concedes that the holders of a majority of the shares in the corporation owe to the minority much the same duty which the directors owe to the stockholders. "They may not use their power to obtain advantages at the expense of the minority; and when that is done equity will interfere to restrain the wrongful acts. All must be permitted to share equally in the benefits; and the law requires, both from the officers of the corporation and the majority stock-

²⁸ *Louisville Bank. Co. v. Eisenman*, 30 *Farmers' &c. Co. v. New York &c. Co.*, 78 *Hun* (N. Y.) 213, 219; s. c. *supra*.

²⁹ *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 *Colo.* 933; s. c. *rev'd*, 150 *N. Y.* 410, 513, 522; s. c. 45 *Pac. Rep.* 444.

holders, the utmost good faith in the management and control of the corporate business and property. But between themselves the stockholders owe no duty to each other. In the purchase and control of his stock or any of the corporate obligations, each stockholder acts for himself, and he is in no sense a trustee for the others."³¹ Accordingly, it has been held that a stockholder in a mining company may make a valid contract with a lessee of the company's land, by which he is to receive a bonus for every ton of coal mined by the lessee in consideration of discontinuing a suit brought by him to enjoin the lease; and the validity of such contract is not affected by his subsequently becoming a director, where the circumstances are not changed.³² So, a purchase by a stockholder of a corporation, of a mortgage given by it, does not inure to the benefit of the corporation, although the purchaser afterwards transfers a half interest therein to a trustee of such corporation, with knowledge of his fiduciary relations, in accordance with an agreement between them before the purchase, so far as the half interest retained is concerned.³³

§ 8602. May Purchase Corporate Property at Judicial Sale.—

The rule which prohibits directors and managing officers of corporations from becoming purchasers at judicial sales of property of the corporation, has no application to mere stockholders. They occupy no fiduciary relation towards the corporation, but may deal with it at arm's-length as strangers for the protection of their own interests, provided they are not guilty of bad faith. A mere stockholder may, therefore, lawfully purchase at a public sale the property of the corporation, provided he does it openly and fairly.³⁴ Accordingly, a sale of the entire property of a corporation, whose business is a failure, to one holding a majority of the shares, at open vendue, after a postponement in the hope of securing bidders, has been held not invalid, although the price bid was much less than the cost of the property.³⁵

³¹ Farmers' Loan &c. Co. v. New York &c. R. Co., *supra*; citing Gamble v. Queens County Water Co., 123 N. Y. 91. ³³ Rio Grande R. Co. v. Armendia, 5 Tex. Civ. App. 449; s. c. 23 S. W. Rep. 568.

³² Bird Coal &c. Co. v. Humes, 157 Pa. St. 278; s. c. 33 W. N. C. (Pa.) 174; 27 Atl. Rep. 750. ³⁴ Price v. Holcomb, 89 Iowa, 123; s. c. 56 N. W. Rep. 407. ³⁵ Price v. Holcomb, *supra*.

CHAPTER CCXXIX.

SUBSCRIPTIONS FOR SHARES.

SECTION	SECTION
8606. Doctrine that preliminary share subscriptions are not binding.	8616. Validity of such conditions in subscriptions made after organizing.
8607. Such subscriptions become contracts when the corporation is organized.	8617. Contractual condition that a stated amount of shares shall be subscribed for.
8608. What constitutes a valid subscription for shares.	8618. Condition must be performed, or subscriber not liable.
8609. What does not constitute a valid share subscription.	8619. When contractual conditions complied with.
8610. Subscriber not liable if all shares were previously taken.	8620. Contemporaneous parol agreement varying the terms of the subscription paper.
8611. Assignment of share subscriptions.	8621. Subscription by a partnership.
8612. Subscriber not bound unless whole amount of capital, or statutory proportion thereof, subscribed.	8622. Issuing preferred shares to a subscriber to common shares.
8613. What are good subscriptions within this rule.	8623. Option to take unissued shares.
8614. What deemed a waiver of this condition.	8624. Taking shares to qualify as a director.
8615. Validity of contractual conditions in subscriptions made before organizing.	8625. Agreements to subscribe in future, void.

§ 8606. **Doctrine that Preliminary Share Subscriptions are not Binding.**—According to the view of some courts, a preliminary subscription to the shares of an intended corporation is of no serious import; the law stamps it with the utmost levity; it is merely an experiment to see what can possibly be done; and one who signs it and who has not signed the articles of incorporation or the formal subscription paper, or otherwise acknowledged his liability as a shareholder, may withdraw at any time, although his co-signers have taken action upon the faith of it.¹ Other courts, not going

¹ *Hudson Real Estate Co. v. Tower*, 42 Am. St. Rep. 379, and note; *Bryant's Pond Steam Mill Co. v. Felt*, 87 161 Mass. 10; s. c. 36 N. E. Rep. 680;

quite so far, hold that a subscriber to the shares of an intended corporation has the right to withdraw his subscription before the organization and acceptance, and before any expense or liability has been incurred.² This doctrine is destitute of business morality and of common sense. Under it, men of business or financial standing, whose judgments on business matters command the confidence of the community, can be induced for a consideration to sign a preliminary contract of subscription to the shares of an intended corporation, and, having thus induced many others to subscribe, may, before the corporation is organized, withdraw and leave in the lurch the dupes whom they have induced, by their example, to sign. If it is said that the dupes may also withdraw, the answer is that the law ought not to allow men to make promises which encourage expectations in others, and then disappoint those expectations. The true rule ought to be that one who subscribes to the shares of an intended corporation becomes estopped to withdraw his subscription, as soon as another has subscribed, until the scheme has failed. If the whole amount which the co-adventurers start out to raise, cannot be raised, then the scheme fails and the estoppel is dissolved. If it is subscribed for, then what was an estoppel ripens into a contract among the subscribers; the promise of each affords a consideration for the promise of each of the others, and the essential elements of a contract thus exist. It is vain and delusive reasoning to say that the contract is not complete until the corporation is brought into being and accepts the promise; since the promisors in their aggregate character are, in substance and sense,

Me. 234; s. c. 33 L. R. A. 593; 11 Nat. Corp. Rep. 263; 3 Am. & Eng. Corp. Cas. (N. S.) 59; 12 Am. R. & Corp. Rep. 176; 47 Am. St. Rep. 323; 32 Atl. Rep. 888; Hudson Real Estate Co. v. Tower, 156 Mass. 82; s. c. 32 Am. St. Rep. 434, and note; 30 N. E. Rep. 465; Halifax Carette Co. v. Moir, 28 N. S. 45; Halifax Street Carette Co. v. McManus, 27 N. S. 173; Plank's Tavern Co. v. Burkhard, 87 Mich. 182; s. c. 10 Ry. & Corp. L. J. 296; 49 N. W. Rep. 562; Muncy Traction Engine Co. v. De La Green, 143 Pa. St. 269; Auburn Bolt & c. Works v. Shultz, 143 Pa. St. 256; s. c. 48 Phila. Leg. Int. 540; 22 Atl. Rep. 904; International Fair & c. Asso. v. Walker, 88 Mich. 62; s. c. 49 N. W. Rep. 1086; 10 Ry. & Corp. L. J. 450; 36 Am.

& Eng. Corp. Cas. 233; Greenbrier Industrial Expo. v. Rodes, 37 W. Va. 738; s. c. 7 Am. R. & Corp. Rep. 653; 17 S. E. Rep. 305; Nemaha Coal & c. Co. v. Settle, 54 Kan. 424; s. c. 38 Pac. Rep. 483. Compare White v. Kahn, 103 Ala. 308; s. c. 15 South. Rep. 595, where the subscription was said to have been designed merely as a test of what might be done. What oral notice of withdrawal given before organization is sufficient under Massachusetts theory: Hudson Real Estate Co. v. Tower, 161 Mass. 10; s. c. 36 N. E. Rep. 680.

² Patty v. Hillsboro Roller-Mill Co., 4 Tex. Civ. App. 224; s. c. 23 S. W. Rep. 336; Lewis v. Hillsboro Roller-Mill Co. (Tex. Civ. App.) 23 S. W. Rep. 338.

the corporation. Jurisprudence is not improved, nor is a practical and enlightened age edified by the spectacle of judges ignoring justice and halting before such metaphysical theories. The sound and honest view is that a subscription to the shares of a proposed corporation is in the nature of a contract and binding and irrevocable from the day on which it is made.³ At least, where it is made on a condition, it cannot be revoked unless there has been unreasonable delay in performing the condition;⁴ but if there has been such an unreasonable delay, then it can be.⁵ In Oregon, one who has signed a preliminary subscription to the capital stock of a corporation, and has signed the consent agreement for the first meeting of the stockholders, and has actually participated in such meeting, is a shareholder, though he has not signed the other subscription book after the filing of the articles of incorporation.⁶ On any theory, a subscriber to the shares of a proposed corporation, to be formed for a particular purpose, cannot, in the absence of circumstances of estoppel, be held liable on his subscription where the corporation is actually formed for a different purpose,—as where the proposition is to form a corporation to furnish “an incandescent system of electric lighting,” and the corporation is formed for the purpose of producing “electricity for light and power.”⁷ It is, therefore, a sound proposition that, in order to charge persons as subscribers to the capital stock of a corporation, it must be shown that they subscribed to the stock of the particular corporation on account of which the liability is claimed, or that they have in some manner recognized their liability as such stockholders.⁸ Clearly, a subscriber cannot avoid liability as a stockholder on this ground where he participated in the organization under the articles, although the purposes of the incorporation may have been expressed therein differently from the manner in which they were expressed in the subscription paper.⁹ It may be added that one

³ *Minneapolis &c. Machine Co. v. Davis*, 40 Minn. 110; s. c. 12 Am. St. Rep. 701. four v. *Baker City Gas Co.*, 27 Or. 307; *Coyote Mining Co. v. Rulle*, 8 Or. 284.

⁴ *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; s. c. 16 Am. St. Rep. 298, and note. ⁷ *Marysville Electric Light &c. Co. v. Johnson*, 109 Cal. 192; s. c. 41 Pac. Rep. 1016; 11 Nat. Corp. Rep. 313.

⁵ *Carter &c. Co. v. Hazzard*, 65 Minn. 432; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 376; 68 N. W. Rep. 74. ⁸ *Harrison Nat. Bank v. Votaw*, 51 Kan. 362; s. c. 32 Pac. Rep. 1111.

⁶ *Nickum v. Burckhardt*, 30 Or. 464; s. c. 47 Pac. Rep. 788; 6 Am. & Eng. Corp. Cas. (N. S.) 550; rehearing denied in 48 Pac. Rep. 474; citing *Bal-* ⁹ *Nickum v. Burckhardt*, 30 Or. 464; s. c. 47 Pac. Rep. 788; 6 Am. & Eng. Corp. Cas. (N. S.) 550; rehearing denied in 48 Pac. Rep. 474.

who is induced to subscribe for shares in a corporation which never completes its organization may recover from the promoters any money he has paid them on account of his subscription; but there is no reason in the qualification that the promoters must have been authorized to receive the money for the corporation;¹⁰ since, the corporation not being in existence, no one could give him such authority.

§ 8607. Such Subscriptions Become Contracts when the Corporation is Organized.—Such subscriptions are in the nature of a *continuing offer*, and become contracts when the corporation is organized and accepts them, unless the offer is revoked before that time.¹¹ No formal acceptance by the corporation of the subscription is necessary, but an acceptance may be inferred from the fact of the corporation retaining the subscription and accepting money on the faith of it;¹² or from the act of the directors in levying an assessment based upon it.¹³ There are untenable holdings, careless of justice, which release the subscriber, even after the corporation has been organized upon the faith, in part, of the subscription.¹⁴ Some of them proceed on the flimsy ground that the act of incorporation contemplated a subscription made *after*, and not before its passage;¹⁵ but in one of them the shares had never been allotted to the subscriber, and there were no circumstances of estoppel.¹⁶ The sound view is that such a contract is a multi-partite contract as among the subscribers themselves, as well as a proposition to the future corporation; and that conse-

¹⁰ Fitzwilliam v. Travis, 65 Ill. App. 183.

¹¹ Hudson Real Estate Co. v. Tower, 156 Mass. 82; s. c. 32 Am. St. Rep. 434; 30 N. E. Rep. 465; West v. Crawford, 80 Cal. 19; Fanning v. Insurance Co., 37 Ohio St. 339; s. c. 41 Am. St. Rep. 517; Minneapolis & C. Machine Co. v. Davis, 40 Minn. 110; s. c. 12 Am. St. Rep. 701; Penobscot R. Co. v. Dummer, 40 Me. 172; s. c. 63 Am. Dec. 654; Griswold v. Trustees, 26 Ill. 41; s. c. 79 Am. Dec. 361; Marysville Electric Light & C. Co. v. Johnson, 93 Cal. 538; s. c. 27 Am. St. Rep. 215; Balfour v. Baker City Gas & C. Co., 27 Or. 300; s. c. 11 Nat. Corp. Rep. 103; 41 Pac. Rep. 164; Richelieu Hotel Co. v. International Military Encamp. Co., 140 Ill. 248;

s. c. 11 Ry. & Corp. L. J. 163; 29 N. E. Rep. 1044; aff'g s. c. 41 Ill. App. 268.

¹² Richelieu Hotel Co. v. International Military Encamp. Co., 140 Ill. 248; s. c. 11 Ry. & Corp. L. J. 163; 29 N. E. Rep. 1044.

¹³ McCormick v. Great Bend Gas & C. Co., 48 Kan. 614; s. c. 29 Pac. Rep. 1147.

¹⁴ Halifax Carrette Co. v. Moir, 23 N. S. 45.

¹⁵ Halifax Street Carrette Co. v. McManus, 27 N. S. 173.

¹⁶ Maquog Textile & C. Co. v. Price, 14 Can. S. C. 644; distinguishing Kidwelly Canal Co. v. Raby, 2 Price, 93, where the language of the incorporating act was, "those who have subscribed or shall hereafter subscribe."

quently a subscriber cannot revoke his subscription after the full amount agreed to be raised has been subscribed.¹⁷

§ 8608. What Constitutes a Valid Subscription for Shares.— Under this head we constantly encounter in the books propositions which are truisms in the law of contracts,— such as that the *delivery* of a subscription contract to an agent authorized by the corporation to solicit and receive subscriptions in its behalf is a delivery to the corporation;¹⁸ that a subscriber to the shares of a corporation already in existence need not sign the articles of incorporation;¹⁹ that such a contract is complete when the subscription is made and the share certificate accepted by the subscriber, so that he cannot thereafter recede therefrom without the consent of the corporation, and not then where the rights of its creditors have intervened;²⁰ that an order for a stated number of shares entered upon the minute book of the secretary of the corporation at the request of the subscriber is a binding written subscription without regard to its form, so long as the intention of the parties can be collected from the writing;²¹ that a share subscription may be in the form of a promissory note setting out the consideration;²² that a subscription to the shares of a corporation thereafter to be formed under a general law becomes a binding contract as soon as the corporation is formed in substantial compliance with the scheme set forth in the subscription paper, and as soon as the subscription has been accepted by the board of directors.²³

§ 8609. What Does Not Constitute a Valid Share Subscription.— An indefinite agreement to subscribe for shares in a corporation to be organized, which does not specify the amount of capital that is to be raised, what proportion of it each subscriber is to take, when or by whom the company is to be organized, is too indefinite to be enforced as a contract.²⁴ The same was held, where there

¹⁷ Philadelphia &c. R. Co. v. Conway, 177 Pa. St. 364; s. c. 35 Atl. Rep. 716.

¹⁸ Great Western Teleg. Co. v. Haight, 49 Ill. App. 633.

¹⁹ Shick v. Citizens' Enterprise Co., 15 Ind. App. 329; s. c. 44 N. E. Rep. 48.

²⁰ Hood v. McNaughton, 54 N. J. L. 425; s. c. 24 Atl. Rep. 497.

²¹ Perkiomen Brick Co. v. Dyer, 13 Mont. Co. L. Rep. (Pa.) 111.

²² Wemple v. St. Louis &c. R. Co., 120 Ill. 196.

²³ McCormick v. Great Bend &c. Co., 48 Kan. 614.

²⁴ Nemaha Coal &c. Co. v. Settle, 54 Kan. 424.

were no circumstances of estoppel, of a paper running in the words, "We, the undersigned, citizens of St. Joseph, promise to pay the trustees of the hotel to be built at St. Joseph the sum set opposite our names, to be taken as stock, \$25 per share."²⁵ The English Court of Appeal have held that an underwriting letter addressed to a corporation offering to subscribe or find subscribers, on or before a certain date, for a certain number of shares, or for a less number, as may be accepted by the corporation, in a company which such corporation is promoting, and in the event of failure to comply with the stated terms, authorizing the corporation, in the writer's behalf and name, to apply for the number of shares which are underwritten or applied for, does not constitute a contract binding the writer to take shares until accepted by such corporation, and notice of acceptance given to him; and the authority to apply for shares in his name does not arise until he has been informed of the number of shares for which his offer is accepted, and until he fails himself to apply for that number.²⁶

§ 8610. Subscriber not Liable if All Shares Were Previously Taken.—Where a corporation is organized with a stated capital and all the shares of the capital are subscribed for, its power to issue further shares is exhausted, until it increases its capital stock and thereby acquires the power to issue further shares, in the manner prescribed by its charter or governing statute. It follows that one who subscribes for its shares after all have been taken by other subscribers cannot be held to the performance of his contract of subscription.²⁷

§ 8611. Assignment of Share Subscriptions.—Share subscriptions are assignable, and the assignee may enforce their payment where the corporation could do so,²⁸—subject, of course, to the principles

²⁵ *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182.

²⁶ *Re Consort Deep Level Gold Mines, (C. A.)* (1897) 1 Ch. 575; s. c. 66 L. J. Ch. (N. S.) 297; 76 Law T. Rep. 300; rev'g s. c. 66 L. J. Ch. (N. S.) 122. For a subscription to the shares of a corporation to be formed which was held not binding under Canadian law, see *Tilsonburg Ag. & C. Co. v. Goodrich*, 8 Ont. 565. That a subscriber may withdraw his proposition at any time before the contract is completed by the issuance of the

stock, was held in *Painesville Nat. Bank v. King Varnish Co.*, 1 Toledo Leg. News (Oh.) 304.

²⁷ *Level Land Co., No. 3 v. Hayward*, 95 Wis. 109; s. c. 69 N. W. Rep. 567; 5 Am. & Eng. Corp. Cas. (N. S.) 606; *Great Western Teleg. Co. v. Lowenthal*, 51 Ill. App. 447. Compare *Perkins v. Union & C. Machine Co.*, 12 Allen (Mass.) 273.

²⁸ *Chattanooga & C. R. Co. v. Warthen*, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

of law which condemn fraudulent conveyances and assignments.²⁹ Especially is such a subscription deemed assignable when made payable to the corporation, "its associates, successors or assigns." Such a subscription may be enforced, under the common-law system of pleading, by an action to the use of the assignee. Nor does it make any difference that the corporation has passed into the hands of a receiver, nor that the shares themselves are worthless: the obligation to pay the subscription nevertheless remains, and may be enforced for the use of the beneficial owner of it.³⁰

§ 8612. **Subscriber not Bound unless Whole Amount of Capital, or Statutory Proportion thereof, Subscribed.**—In every contract of subscription the law implies the condition that the subscription shall not be binding unless the whole amount of capital which it is attempted to raise is subscribed for in good faith by persons capable of so subscribing and of being shareholders, or unless the amount fixed by the governing statute as the minimum amount upon which the corporation can commence business is so subscribed for. Unless this condition is fulfilled, the subscriber is not liable, in the absence of a waiver or an estoppel.³¹ Statutes exist which vary this rule, and which permit the adventurers to organize a corporation and embark it upon the business for which it is formed when a stated percentage of the capital has been subscribed;³² but

²⁹ Of which a good example is found in a case in Maine where it was held that an assignment of a stock subscription by a corporation to one of its former stockholders and directors is fraudulent, and that the subscription cannot be enforced against the subscriber, where it was a part of a plan, pursuant to which the assignee transferred all the assets of the corporation to a rival corporation under guise of a sale of the entire issue of stock to the latter, thereby practically abolishing the corporation and destroying the value of its capital stock: *Cusick v. Bartlett*, 91 Me. 153; s. c. 39 Atl. Rep. 497.

³⁰ *Chattanooga &c. R. Co. v. Warthen*, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

³¹ *Hards v. Platte Valley Imp. Co.*, 35 Neb. 263; s. c. 53 N. W. Rep. 73; *Denny Hotel Co. v. Schram*, 6 Wash. 134; s. c. 32 Pac. Rep. 1002; *Birge v. Browning*, 11 Wash. 249; s. c. 39

Pac. Rep. 643; *Elderkin v. Peterson*, 8 Wash. 674; s. c. 36 Pac. Rep. 1089; *Curry Hotel Co. v. Mullins*, 93 Mich. 318; s. c. 53 N. W. Rep. 360; *Masonic Temple Asso. v. Channell*, 43 Minn. 353; s. c. 45 N. W. Rep. 716; *Duluth Invest. Co. v. Witt*, 63 Minn. 538; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 56; 65 N. W. Rep. 956. There is a case in California to the effect that where a prospectus stated that the opera house which was the object of the subscription was "to be built by a corporation with a capital stock of \$20,000, consisting of one thousand shares at \$20 per share," it was not a condition precedent to the liability of a subscriber that the whole amount of the capital stock so stated should be subscribed for: *Auburn Opera House &c. Asso. v. Hill*, (Cal.) 32 Pac. Rep. 587.

³² *Lincoln Shoe Man. Co. v. Sheldon*, 44 Neb. 279; s. c. 48 Am. & Eng. Corp. Cas. 428; 62 N. W. Rep. 480.

under such a statute, until the stated percentage has been subscribed, the subscribers are not liable.³³ It does not prevent the operation of this rule that the corporation has become a corporation *de facto*, so that its existence cannot be questioned collaterally; this will not enable it to recover against a subscriber to its capital stock, where the condition upon which his subscription was made has not been complied with or waived by him.³⁴

§ 8613. What are Good Subscriptions within this Rule.—To satisfy the foregoing rule, the prescribed amount of capital to be raised must be filled up by the subscriptions of persons competent to make them, made in good faith, and not colorably, with a secret agreement for the release of the subscription. A joint subscription to stock by the *trustees* of the corporation for the purpose of completing the subscription for the full capital stock, is a binding contract and effectual for the purpose of perfecting the liability of former subscribers on their subscriptions.³⁵ A subscription by a *married woman*, made at the request of her husband, the assessments of which are paid by him, has been held to render him personally liable as a subscriber, and for that reason to be counted as a good subscription in making up the requisite amount under this rule.³⁶

§ 8614. What Deemed a Waiver of this Condition.—As above intimated, this condition is capable of being waived by the shareholders, and they may, by their conduct, estop themselves from availing themselves of it. It is so waived where the shareholder pays the required admission fee and installment due on each share, receives his share certificate, and is credited with dividends in respect of his shares.³⁷ It is so waived, and an estoppel arises, where a majority of the subscribers to the shares of a railway company enter into an agreement supplementary to their share subscriptions, to pay their subscriptions as fast as the work of construction progresses, on the faith of which agreement the directors enter into and carry out contracts for such construction,—the waiver and estoppel operating only as against the parties to the

³³ Fairview R. Co. v. Spillman, 23 Or. 587; s. c. 32 Pac. Rep. 688.

³⁴ Fairview R. Co. v. Spillman, 23 Or. 587; s. c. 32 Pac. Rep. 688.

³⁵ Hardin v. Mullin, 16 Wash. 647; s. c. 48 Pac. Rep. 349.

³⁶ Kampmann v. Tarver, (Tex. Civ. App.) 29 S. W. Rep. 1144.

³⁷ Duluth Invest. Co. v. Witt, 63 Minn. 538; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 56; 65 N. W. Rep. 956.

agreement.³⁸ Such a condition is waived by the subscriber signing and acknowledging the articles of incorporation, acting as one of the trustees, voting for calls upon the shares, and performing other acts which necessarily recognize the rightful existence of the corporation.³⁹ But it is not waived by the payment by a subscriber of part of his subscription without knowledge of the failure to procure the required amount;⁴⁰ by consenting to and waiving notice of a stockholders' meeting on three occasions, and voting by proxy at a special meeting, where he does not then know that the required amount of stock has not been subscribed.⁴¹

§ 8615. **Validity of Contractual Conditions in Subscriptions Made before Organizing.**—A provisional subscription made with a view to the organization of a corporation may be qualified by any lawful condition which the subscriber chooses to annex thereto.⁴² But the doctrine is necessarily limited to conditions which may be lawful, and excludes conditions which are, or may become repugnant to the contract,—such as a condition in a subscription to the shares of a railway company, undertaking to settle in advance the length of time the corporation shall remain in control of its road, and the manner in which its business shall be conducted.⁴³ An agreement to subscribe and pay for stock within thirty days from the organization of a corporation means stock of a corporation *de jure*, and not *de facto*, and therefore is not binding until the corporation is lawfully organized so as to be authorized to do business.⁴⁴

§ 8616. **Validity of Such Conditions in Subscriptions Made after Organizing.**—An agreement for the purchase from a corporation of shares of its capital stock, providing that, at the end of a certain

³⁸ Anderson v. Middle &c. R. Co., 91 Tenn. 44; s. c. 17 S. W. Rep. 803.

³⁹ Auburn Opera House &c. Asso. v. Hill, (Cal.) 32 Pac. Rep. 587.

⁴⁰ Johnson v. Schar, 9 S. Dak. 536; s. c. 70 N. W. Rep. 838.

⁴¹ Fairview &c. R. Co. v. Spillman, 23 Or. 587; s. c. 32 Pac. Rep. 688.

⁴² Fairview &c. R. Co. v. Spillman, 23 Or. 587; s. c. 32 Pac. Rep. 688.

⁴³ Russell v. Alabama &c. R. Co., 94 Ga. 510; s. c. 20 S. E. Rep. 350.

⁴⁴ Capps v. Hastings Prospecting Co., 40 Neb. 470; s. c. 24 L. R. A. 259; 58 N. W. Rep. 956. Construction of an underwriting letter for shares, with the conclusion that a request by the

promoters to the underwriter to apply for the shares, was a condition precedent to the obligation on his part to sign and lodge the application for the shares with a check for the deposit: Re Bultfontein Sun Diamond Mine, (C. A.) 75 Law T. Rep. 669. Construction of an underwriting letter for shares containing an agreement with the vendor and the company, with the conclusion that a request by the vendor to the underwriters to subscribe for or find responsible subscribers, was a condition precedent to their being treated as shareholders: Re Harvey's Oyster Co., (1894) 2 Ch. 474.

time, the purchaser may, at his option, return the stock and receive back the purchase price, constitutes a conditional sale with an option to the purchaser to revoke or rescind, and is not *ultra vires*, but is enforceable between the original parties thereto, the rights of creditors not being involved.⁴⁵ A subscription delivered to the soliciting agent of a company, in escrow, with directions not to deliver it to the company, until the subscriber has had an opportunity to make further investigations into its character, and until a direction for its delivery shall be given, does not constitute an irrevocable contract of subscription where, after making the investigations, he directs the cancellation of his subscription, and is not thereafter for twenty years treated or recognized as a stockholder.⁴⁶

§ 8617. **Contractual Condition that a Stated Amount of Shares shall be Subscribed for.**— It is, of course, competent for the parties to a subscription to the shares of a projected corporation to agree, as a condition of their subscriptions, that a given amount of stock shall be subscribed for before the subscriptions become binding; so that, if this condition is not realized, the subscribers will not be liable.⁴⁷ Where the contract of subscription stipulated that it was “to be binding upon each party hereto when \$50,000 has been *bona fide* subscribed, and not before,” the mere fact that, at the meeting called to organize the corporation, a subscriber who was subsequently elected president, “verbally guaranteed the subscription to be \$50,000,” without subscribing for or agreeing in writing to take and pay for the additional shares necessary to make up the \$50,000, did not make the contract of subscription binding upon the other subscribers.⁴⁸ Where different subscription papers are circulated and one of them contains an agreement that the total number of shares taken under the “terms” thereof shall be a stated number, and the other papers contain different terms and conditions, a subscriber to the former paper is not liable unless the stated number contained in the terms and conditions of *that paper* are subscribed for. It will not be enough that, taking this paper in connection with the others, the requisite number is made up.⁴⁹

⁴⁵ *Vent v. Duluth Coffee &c. Co.*, 64 Minn. 307; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 142; 67 N. W. Rep. 70.

⁴⁶ *Great Western Teleg. Co. v. Loewenthal*, 154 Ill. 261; s. c. 40 N. E. Rep. 318.

⁴⁷ *Johnson v. Schar*, 9 S. Dak. 536; s. c. 70 N. W. Rep. 838.

⁴⁸ *Branch v. Augusta Glass Works*, 95 Ga. 573; s. c. 23 S. E. Rep. 128.

⁴⁹ *Johnson v. Schar*, 9 S. Dak. 536; s. c. 70 N. W. Rep. 838.

§ 8618. Condition must be Performed, or Subscriber not Liable.—

A condition annexed to a subscription for stock in a public or private corporation must be performed before a subscriber can be compelled to pay his subscription; but a reasonable performance is sufficient. It was so held with reference to a condition in a subscription to the shares of a railway company, that it should be payable whenever the board of directors should decide that the railroad has been finished to a point within one mile from the center of a city.⁵⁰

§ 8619. When Contractual Conditions Complied with.—A condition of subscription to the shares of a railroad company, that its main line shall pass through the corporate limits of a certain town, is complied with by constructing the road upon any line or route through the town.⁵¹

§ 8620. Contemporaneous Parol Agreements Varying the Terms of the Subscription Paper.—These, in general, are futile, and the subscriber is held to his agreement as written; and this is especially true of "stool pigeon" contracts. For example, one who makes a subscription for stock of a corporation, to aid the agent of the corporation in procuring other subscriptions, cannot subsequently withdraw his subscription under a secret agreement with the agent, since such an act is a fraud on other subscribers.⁵²

§ 8621. Subscription by a Partnership.—A subscription in the name of a firm cannot be accepted by placing the name of one member only of the firm in the charter. If accepted at all, it must be accepted in its entirety.⁵³ On the other hand, a member of a firm who signs his own name to the articles of association does not become liable individually for the shares set opposite his name where his firm signs an application for that number of shares and pays for them, and the company treats the shares allotted to the firm as satisfying the subscription of the member and as furnishing his qualification as a director for several years.⁵⁴

⁵⁰ Hall v. Sims, 106 Ala. 561; s. c. 17 South. Rep. 534.

⁵¹ Chattanooga &c. R. Co. v. Warthen, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

⁵² Great Western Teleg. Co. v. Haight, 49 Ill. App. 633.

⁵³ Halifax Cigarette Co. v. Moir, 28 N. S. 45.

⁵⁴ Re Glory Paper Mills Co., (C. A.) [1894] 3 Ch. 473.

§ 8622. **Issuing Preferred Shares to a Subscriber to Common Shares.**—It has been reasoned that a subscriber to the common stock is entitled to the shares he contracted for, and cannot be compelled to accept preferred stock where the corporation has disabled itself from delivering to him common stock, merely because the corporation may think the preferred stock equally as good or better. And he may, of course, refuse to accept preferred stock where it is invalid for any reason.⁵⁵

§ 8623. **Option to take Unissued Shares.**—The House of Lords have held that the fact that a company has given to any person the option of taking its unissued shares at a future date and agreed price, does not fetter the company in any way in the conduct of its business in the interval; but it may exercise all the powers conferred upon it by its memorandum or articles of association, and either dispose of the business to another company or agree to a voluntary liquidation. On the other hand, after proceedings in liquidation have commenced, the person holding the option thus to take the shares of the company may exercise it for the good it may do him, and may demand the right to have the shares issued to him; and if the liquidators refuse to do so, the measure of his *damages* is his share in the existing assets of the company after deducting the price he had agreed to pay for the shares.⁵⁶

§ 8624. **Taking Shares to Qualify as a Director.**—In a case which exhibits a considerable division of judicial opinion on the question, it was held by the English Court of Appeal that the directors of a company, whose articles of association provide that the signers shall be directors until six of them nominate another director; that the qualification of a director shall be the holding a certain amount in shares to be acquired within three months from appointment; and that, unless he shall do so, he shall be deemed to have agreed to take the shares,—are not bound to take the qualification shares where they resign within three months from their appointment.⁵⁷

⁵⁵ Railroad &c. v. Knoxville, 98 Tenn. 1; s. c. 37 S. W. Rep. 883.

⁵⁶ Hirsch v. Burns, (H. L.) 77 Law T. Rep. 377; aff'g s. c. 74 Law T. Rep. 769.

⁵⁷ Re R. Bolton & Co., (C. A.) [1894] 3 Ch. 356; s. c. 64 L. J. Ch. (N. S.)

285. That the mere acceptance of the office of director does not, under the Companies Act 1862, § 23, constitute one a shareholder in respect of the number of shares necessary to qualify him as such, see the opinion of Vaughan Williams, J., reviewing

§ 8625. **Agreements to Subscribe in Future, Void.**—There is a decision of a respectable court to the effect that, under the operation of statutes⁵⁸ providing for the issue of capital stock only for money, labor done, or property actually received, and requiring 10 per cent of each subscription to be paid in cash, an agreement with a corporation by which the obligor engages to subscribe for a certain number of its shares in future, upon the happening of a stated contingency, and to pay for them in a stated manner, no subscription being actually made in conformity with the statute, is void as involving an attempt to acquire shares in a corporation in a manner not allowed by the statute.⁵⁹

authorities, in *Re Issue Co.* [1895] 1 Ch. 226; s. c. 64 L. J. Ch. (N. S.) 131. ⁵⁹ *General Electric Co. v. Wightman*, 3 App. Div. (N. Y.) 118; s. c. 39 N. Y. Supp. 420.

⁵⁸ N. Y. Laws 1890, ch. 564, §§ 41, 42; N. Y. Laws 1892, ch. 688.

CHAPTER CXXX.

RELEASE OF SUBSCRIBERS FOR SHARES.

SECTION	SECTION
8629. Changes in the corporate character and purpose which release the subscriber.	8631. Other facts which do not release the subscriber.
8630. Changes in corporate character and purpose which do not release a subscriber.	8632. Conditions which will not release the subscriber.
	8633. Releasing particular shareholders.

§ 8629. **Changes in the Corporate Character and Purpose which Release the Subscriber.**—A subscriber to the shares of a proposed corporation having a named purpose, character, amount of capital, etc., cannot be held to his contract of subscription if, without his assent and without any circumstances of estoppel against him, the corporation, as organized, is for a different purpose, or of a different character, or has a different capital, or is, in any essential particular, different from the corporation as described in the subscription paper,¹—as where the subscription paper calls for a capital stock of \$50,000, and the corporation as organized has a capital of \$100,000, and names as the purposes of the corporation, other objects than those named in the original paper.²

§ 8630. **Changes in Corporate Character and Purpose which do not Release a Subscriber.**—On the other hand, a subscriber to the capital stock of a corporation is not released by reason of a legislative amendment of the charter making radical and material changes, never accepted or acted upon by the company, and which, by its own terms, becomes inoperative;³ nor because, although the corporation was organized under a somewhat different name from that used in the preliminary contract of subscription, there was no

¹ Norwich Lock Man. Co. v. Hockaday, 89 Va. 557; s. c. 17 Va. L. J. 155; 47 Alb. L. J. (N. Y.) 292; 40 Am. & Eng. Corp. Cas. (N. S.) 113; 16 S. E. Rep. 877.

² Baker v. Fort Worth Bd. of Trade,

8 Tex. Civ. App. 560; s. c. 28 S. W. Rep. 403.

³ Chattanooga &c. R. Co. v. Warthen, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

material departure in its charter from its character and purposes as there described;⁴ nor because of a sale, legally authorized, of all the property and franchises of the corporation to another company;⁵ nor, where the rights of creditors have intervened, because the corporation, after its organization, entered upon illegal projects not called for by its articles of incorporation;⁶ nor by reason of mere oral agreements among the promoters that the corporation should be organized for another and different purpose from that named in the articles of incorporation.⁷

§ 8631. **Other Facts Which do not Release the Subscriber.**—It has been held that a subscriber to the shares of a corporation will not be released from his contract by reason of the fact that other subscribers have not paid their subscriptions in full;⁸ that the managing officers of the corporation have mismanaged its affairs, or committed breaches of their trust in a given particular;⁹ that the subscriber was released from the obligation of his subscription, the rights of creditors being involved;¹⁰ that the promoters secured a subscription to the capital stock of the proposed company in excess of the prescribed amount, it not appearing that the defendant's stock was a part of the alleged excess;¹¹ that the directors passed a resolution to declare the shares of the subscriber forfeited for non-payment of his subscription at the end of thirty days, no further action to forfeit the shares having been taken.¹²

§ 8632. **Conditions which will not Release the Subscriber.**—A subscriber to the stock of a railroad company is not relieved from liability because rights of way were purchased by the company

⁴ *Joseph v. Davis*, (Ala.) 10 South. Rep. 830.

⁵ *Chattanooga &c. R. Co. v. Warthen*, 98 Ga. 599; s. c. 25 S. E. Rep. 988.

⁶ *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 164; 42 N. E. Rep. 403.

⁷ *Globe Sewer Pipe Co. v. Otis*, 22 N. Y. Supp. 411; s. c. 51 N. Y. St. Rep. 917. Compare *United States Vinegar Co. v. Schlegel*, 51 N. Y. St. Rep. 453; s. c. aff'd, 143 N. Y. 537.

⁸ *Cook v. Hopkinsville &c. Turnp. R. Co.*, 17 Ky. L. Rep. 839; s. c. 32 S. W. Rep. 748.

⁹ *Hards v. Platte Valley Improve. Co.*, 46 Neb. 709; s. c. 3 Am. & Eng. Corp. Cas. (N. S.) 52; 65 N. W. Rep. 781.

¹⁰ *Kesner v. World's Fair Hippodrome &c. Co.*, 62 Ill. App. 89; *Stone v. Vandalia Coal &c. Co.*, 59 Ill. App. 536; *United Growers Co. v. Eisner*, 22 App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906.

¹¹ *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329; s. c. 44 N. E. Rep. 48.

¹² *Hays v. Franklin County Lumber Co.*, 35 Neb. 511; s. c. 53 N. W. Rep. 381.

contrary to the provisions of the subscription contract, where such provisions were for the benefit of another railroad company which waived the same.¹³ Where a subscription was made to the shares of a turnpike company upon condition that the subscriber and another person should have the contract for constructing the road, the fact that the company, by obstructing the work, compelled the contractors to bring suit against it in which they obtained a judgment for damages,—furnishes no defense on the part of the subscriber to an action by the company to recover a balance due on his subscription.¹⁴

§ 8633. **Releasing Particular Shareholders.**—In the absence of express statutory authorization, it is not competent for a corporation, under any statutory scheme of incorporation with which the writer is acquainted, to sanction the withdrawal from the corporation of its dissatisfied members, thereby shifting the burden of sustaining the enterprise upon the other stockholders, and diminishing the capital stock which is a trust fund for its creditors. This statement of doctrine assumes that the dissatisfied shareholder has no legal right to rescind on the ground of fraud or otherwise. Nor does it exclude the right of the directors to make compromises with shareholders of doubtful and disputed rights.¹⁵ An exception to the rule has also been noted under the English Companies Acts which, as construed by the House of Lords, conferred upon the shareholders the power, with the sanction of the court, to *reduce the capital* of the company upon liquidating the shares of particular members.¹⁶ Hence, a by-law authorizing a stockholder to surrender his shares and withdraw, by giving a prescribed notice, is invalid.¹⁷ The fact that shares of stock issued to a county in payment for bonds of the county are practically worthless furnishes no reason for the cancellation of such stock against the will of the county owning it. Nor does the fact that the county bonds issued in exchange for the shares have been adjudged to be invalid, authorize a judicial cancellation of the shares, without an offer to return the bonds.¹⁸

¹³ Philadelphia &c. R. Co. v. Conway, 177 Pa. St. 364; s. c. 35 Atl. Rep. 716.

¹⁴ Cook v. Hopkinsville &c. Turnp. R. Co., 17 Ky. L. Rep. 839; s. c. 32 S. W. Rep. 748.

¹⁵ 2 Thomp. Corp., § 1553.

¹⁶ Post, §§ 6894, 6896.

¹⁷ Vercontere v. Golden State Land Co., 116 Cal. 410; s. c. 48 Pac. Rep. 375; 6 Am. & Eng. Corp. Cas. (N. S.) 650.

¹⁸ Perry County v. Stebbings, 66 Ill. App. 427.

CHAPTER CCXXXI.

EFFECT OF FRAUD IN PROCURING SHARE SUBSCRIPTIONS.

SECTION	SECTION
8635. Right of rescission for frauds of promoters, members of syndicates, etc., before organization.	8638. What misrepresentations, etc., not sufficient ground of rescission.
8636. What false prospectuses, representations, concealments, etc., afford ground for rescission.	8639. Mere non-disclosure as a ground of rescission.
8637. Reliance upon other subscribers between whom and the corporation secret arrangements have been made.	8640. Effect of delay in claiming a rescission.
	8641. Effect of a forfeiture of the shares of one induced to subscribe through fraud.

§ 8635. **Right of Rescission for Frauds of Promoters, Members of Syndicates, etc., before Organization.**—The true doctrine under this head is believed to be that, where a person is induced to become a subscriber to the shares of an intended corporation by the fraudulent representations of its promoters, or of members of a syndicate, or of any one who, for any reason, is interested in getting up the corporation, if, after the corporation is organized and at a time when it acquires the right to adopt or reject the subscription so as to make it a binding contract, its managing officers are apprised of the fraud, it adopts it subject to a right of rescission on the part of the defrauded sharetaker, provided he demands a rescission in time, under principles elsewhere stated. In other words, when a corporation, with knowledge, adopts a contract procured in its behalf through fraud, it adopts the fraud, as much so as though the fraud had been committed by its authorized agent with the knowledge of its managing board of officers. For example, one who is induced through fraud to subscribe to the capital stock of a proposed land company, by a promoter thereof who represents that it will be a first-class investment, and that he has no other interest in the lands proposed to be purchased than that of a mere stockholder, whereas he in fact holds an option for the purchase of such lands, may repudiate the contract of subscription at his option; and upon his doing so the

land company cannot recover unpaid assessments on the stock subscribed for by him.¹ So, if the promoters of a corporation attach to the prospectus issued before its formation, a list of members of the council of administration, this is a representation that the persons named have authorized the publication of their names as members, and not of their mere willingness to join; and, if untrue, entitles one who has subscribed in reliance thereon to rescind the contract of subscription and recover back the money paid thereon.² Some courts have been unable to reach this salutary principle,—holding, on a state of facts like those just referred to, that the remedy of the defrauded sharetaker is not against the corporation for a rescission of the contract of subscription, because it has been guilty of no fraud although it has obtained the fruits of the fraud, but remanding the injured party to an action against the fraudulent promoters for an accounting.³ Another court has gone so far in the opposite direction as to hold that the fact that the defrauded sharetaker settles with the promoters for their conversion to their own use of the money paid by him for the shares, knowing of the conversion, does not affect his right, as between himself and the corporation, to rescind the contract on the ground that he was induced to make it through false representations,—he having no knowledge of the false representations at the time when he made the settlement.⁴ But where the fraud is entirely disconnected from the corporation, and the corporation is entirely innocent of it, clearly it cannot be made responsible for it in any proceeding. For example, where a corporation, being in difficulties, sold its property to an incorporated “syndicate” for a round sum, and a subscriber to the shares of the syndicate was induced by the frauds of other members of the syndicate, but not by any fraud of the corporation, to subscribe for shares — not of the vendor corporation, but of the syndicate — and to give his notes for the purchase price of such shares, which notes went into the hands of the vendor corporation as a part of the purchase price of its properties,—the

¹ Virginia Land Co. v. Haupt, 90 Va. 533; s. c. 19 S. E. Rep. 168.

² Re Karberg's Case, (C. A.) (1892) 3 Ch. 1; s. c. 39 Am. & Eng. Corp. Cas. 692. The court cited Wainwright's Case, 62 Law Times (N. S.) 30; s. c. aff'd, 63 Law Times (N. S.) 429.

³ Franey v. Warner, 96 Wis. 222; s. c. 71 N. W. Rep. 81; 7 Am. & Eng.

Corp. Cas. (N. S.) 101; Getty v. Devlin, 54 N. Y. 403; Getty v. Devlin, 70 N. Y. 504; United States Vinegar Co. v. Schlegel, 67 Hun (N. Y.) 356; s. c. 51 N. Y. St. Rep. 453; 22 N. Y. Supp. 407; s. c. aff'd, 143 N. Y. 537.

⁴ Hunter v. French League Safety Cure Co., 96 Iowa, 573; s. c. 85 N. W. Rep. 828.

maker of the notes could not have them delivered up and canceled, on the ground that he had been induced to give them through the fraud of his co-adventurers in the syndicate.⁵

§ 8636. **What False Prospectuses, Representations, Concealments, etc., Afford Ground for Rescission.**—The following false statements, concealments, etc., have been held sufficient ground to rescind a contract of share subscription induced thereby, provided the right of rescission has not been lost by laches, acquiescence, lapse of time, or other circumstances elsewhere stated:—A statement by an agent, authorized to sell the shares of the corporation, to the effect that none of its shares had been sold for less than a stated sum per share, whereas some of them had in fact been sold for one-fifth of that sum;⁶ an erroneous representation made by the president of the corporation, through whom the shares were purchased, to the effect that all the shares had been purchased, but that he could purchase shares from original subscribers at a premium, where some of the stock transferred had been previously surrendered to the corporation, and it received the premium allowed for such stock;⁷ where a person applied for membership in a corporation and received a certificate of membership under the belief that it was an old society of which he had taken steps to become a member, which belief was known to and fostered by the person obtaining his application, and where, in response to subsequent inquiries made of the new company, false statements were made to him which resulted in confirming his error. Here there was not merely a voidable contract, but no contract at all.⁸ Another principle is that it is not necessary, in order to a right of rescission on the ground of false statements, that the person making the statements knew that they were false at the time he made them. "They may have been innocently made; yet, if represented as positive statements of fact, as distinguished from mere opinions, and relied on

⁵ *Bank v. Looney*, 99 Tenn. 278; s. c. 38 L. R. A. 837; 42 S. W. Rep. 149.

⁶ *Wenstrom Consol. Dynamo & Co. v. Purnell*, 75 Md. 113; s. c. 35 Am. & Eng. Corp. Cas. 628; 23 Atl. Rep. 134.

⁷ *McDoel v. Ohio Valley Improv. & Co.*, (Ky.) 36 S. W. Rep. 175; s. c. 18 Ky. L. Rep. 294.

⁸ *Re International Soc. of Auctioneers*, (1898) 1 Ch. 110; s. c. 77

Law T. Rep. 523; 67 L. J. Ch. (N. S.) 81. As to the right of rescission of share subscriptions for fraud, see *Fear v. Bartlett*, 81 Md. 435; s. c. 33 L. R. A. 721; 32 Atl. Rep. 322, and the learned note appended thereto. That fraud may be a good defense to an action for the subscription price of shares,—see *Provincial Ins. Co. v. Brown*, 9 Up. Can. O. P. 286; *French v. Ryan*, 104 Mich. 625.

by the other party to his prejudice, to the extent that he is led to act thereon, equity will afford relief."⁹

§ 8637. Reliance Upon Other Subscribers between whom and the Corporation Secret Arrangements have been Made.—It has been held by a respectable court that a secret agreement between a corporation and certain subscribers to its shares, by which these subscribers are to have some advantage not given to all the others, or by which they are to be released from their subscriptions, affords no defense to an action brought to collect the subscription of one who was not appraised of or let into this arrangement.¹⁰ The decision may have been right on its facts, the action having been, not by the corporation for calls while a going concern, but by a receiver after insolvency; but the principle of the above text cannot be upheld where the defrauded sharetaker demands a rescission in time. The above language describes a frequent and vulgar species of fraud. Perhaps the most common practice under this head is to induce prominent men, in whom the public have confidence, to become directors of corporations, upon being secretly indemnified against liability both as directors and shareholders,—thus making them stool pigeons or decoys to entice others to subscribe for the shares. Can any just-minded man say that one who has been thus entrapped into making a subscription to the shares of a corporation, to his loss, has not been cheated? The frauds of Ernest Hooley, the revelations of which created such a sensation in the business world, not only in London but elsewhere, in the year 1898, were of this character.

§ 8638. What Misrepresentations, etc., not Sufficient Ground of Rescission.—It is almost needless to repeat that false statements in a prospectus are not ground for rescission of a contract to take shares in a company, where the subscriber is not misled thereby;¹¹ as where the prospectus was issued *after* the subscription had been made.¹² Moreover, it has been held that misrepresentations or

⁹ *Hunter v. French League Safety Cure Co.*, 96 Iowa, 573, 578; quoting from *Mohler v. Carder*, 73 Iowa, 582; s. c. 35 N. W. Rep. 647.

¹⁰ *Armstrong v. Danahy*, 75 Hun. (N. Y.) 405; s. c. 56 N. Y. St. Rep. 743; 27 N. Y. Supp. 60.

¹¹ *McKeown v. Boudard-Peveril*

Gear Co., (C. A.) 65 L. J. Ch. (N. S.) 735; s. c. 74 Law T. Rep. 712; s. c. aff'g 65 L. J. Ch. (N. S.) 446; s. c. 74 Law T. Rep. 310.

¹² *Negley v. Hagerstown Man. &c. Imp. Co.*, 86 Md. 692; s. c. 39 Atl. Rep. 506.

concealments which will avoid such a contract must be of matters not within the knowledge, or means of knowledge, of the subscriber. Misrepresentations or concealments regarding facts disclosed by the charter, such as the powers assumed by the corporation, will not, therefore, have this effect; and this for the further reason that they are misrepresentations of matters of law.¹³ A subscriber to the capital stock of a railway company, chartered under the general law of Georgia, cannot avoid payment on the ground of fraudulent representations regarding a construction company, its resources, and the value of its stock, which the railway company has agreed to deliver to its stockholders; since he is chargeable with notice that the railway company had no power to issue such stock.¹⁴

§ 8639. Mere Non-Disclosure as a Ground of Rescission.— Mere non-disclosure may undoubtedly be a ground of rescission; but to have this effect the non-disclosure ought to be of a fact which the vendee has a right to know, so that the circumstances cast a duty on the vendor, under the principles of fair dealing, to disclose it to him. It has been well held that, to render the mere non-disclosure of facts in a prospectus a ground for rescinding a contract to take shares made upon the faith of it, there must be such a non-disclosure as to render the prospectus, as it stands, misleading.¹⁵ It has been held that a prospectus of a corporation which merely specifies the dates and names of the parties to contracts in compliance with the governing statute,¹⁶ is fraudulent, where it gives no further notice of circumstances contained in the contracts which are material to be known, so that the omission of them causes it to give a false impression.¹⁷

§ 8640. Effect of Delay in Claiming a Rescission.— A stockholder cannot rescind his subscription on the ground of fraud of the corporation in procuring it, after the rights of *bona fide* creditors have intervened and the corporation has stopped payment and become actually insolvent, unless he has been diligent in discovering the

¹³ Oil City Land &c. Co. v. Porter, (C. A.) 65 L. J. Ch. (N. S.) 735; s. c. 99 Ky. 254; s. c. 18 Ky. L. Rep. 151; 74 Law T. Rep. 712.

³⁵ S. W. Rep. 643.

¹⁴ Russell v. Alabama &c. R. Co., 94 Ga. 510; s. c. 20 S. E. Rep. 350.

¹⁵ McKeown v. Boudard-Peveril Gear Co., 65 L. J. Ch. (N. S.) 446; s. c. 74 Law T. Rep. 310; s. c. aff'd,

¹⁶ English Companies Act 1867, § 38.

¹⁷ Aaron's Reefs v. Twiss (H. L. (I.)) (1896) A. C. 273; s. c. 65 L. J. P. C. (N. S.) 54; 74 Law T. Rep. 794; aff'g s. c. (1895) 2 I. R. 207.

fraud and repudiating his subscription after such discovery.¹⁸ But if he has been diligent in discovering the fraud and prompt to repudiate his subscription by reason of it, the mere insolvency of the corporation will not cut off his right of rescission.¹⁹ Other American courts still adhere to the English rule that there can be no disaffirmance after the rights of creditors have supervened through the insolvency of the corporation.²⁰ The doctrine may be comprehensively stated, without much fear of inaccuracy, thus: One induced to become a subscriber to the capital stock of a corporation by the fraud of the corporation, who, within a reasonable time after discovering of the fraud, without laches on his part in discovering the same, repudiates his subscription before proceedings of insolvency, voluntary or involuntary, have been instituted against the corporation, or some act done that in law is regarded as an act of insolvency, is relieved of all liability on account of his subscription.²¹ That he must act with promptness after discovering the fraud, has always been the doctrine on this subject.²² Accordingly, a right of rescission was denied where the defrauded sharetaker acted for three years as a director, and took an active part in the management of the corporation with knowledge of its business methods and financial condition;²³ and also where the sharetaker, after repudiating his subscription on the ground of having been misled by the prospectus, subsequently paid further sums on account of his shares with the idea of getting back the money originally paid, as his want of promptness may have affected the rights of the others.²⁴ The subscriber is not entitled to a rescission where, after discovering the fraud, he refrains from action until the corporation becomes hopelessly insolvent, in reliance upon a promise, which is not fulfilled, that a large dividend will be de-

¹⁸ *Martin v. South Salem Land Co.*, 94 Va. 28; s. c. 2 Va. Law Reg. 743; 26 S. E. Rep. 591; 6 Am. & Eng. Corp. Cas. (N. S.) 312.

¹⁹ *Newton Nat. Bank v. Newbegin*, 74 Fed. Rep. 135; s. c. 28 Chicago Leg. News, 295; 33 L. R. A. 727; 20 C. C. A. 339; 40 U. S. App. 1; *Stufflebeam v. De Lashmutter*, 83 Fed. Rep. 449; *Beal v. Dillon*, 5 Kan. App. 27; s. c. 47 Pac. Rep. 317; 6 Am. & Eng. Corp. Cas. (N. S.) 186.

²⁰ *Moosbrugger v. Walsh*, 89 Hun (N. Y.) 564; 70 N. Y. St. Rep. 117; s. c. 35 N. Y. Supp. 550; citing *Mc-*

Dermott v. Harrison, 30 N. Y. St. Rep. 324; s. c. 9 N. Y. Supp. 184; *Bosley v. National Machine Co.*, 123 N. Y. 550.

²¹ *Fear v. Bartlett*, 81 Md. 435; s. c. 33 L. R. A. 721; 32 Atl. Rep. 322.

²² *Aaron's Reefs v. Twiss* (H. L. (I.)) (1896) A. C. 273, 294, and cases cited.

²³ *American Bldg. &c. Asso. v. Rainbolt*, 48 Neb. 434; s. c. 67 N. W. Rep. 493.

²⁴ *Re Dunlop-Truffault Cycle &c. Man. Co.*, 66 L. J. Ch. (N. S.) 25; s. c. 75 Law T. Rep. 385.

clared.²⁵ On the other hand, one who has been induced to purchase the shares of a national bank by false representations made by its president and cashier of its condition, who rescinds the contract and tenders back the shares, duly assigned, to the president of the bank, and calls upon him to return the consideration, and brings a suit for rescission of the contract,— cannot be held liable in a suit by a receiver of the bank to recover an assessment upon such stock.²⁶

§ 8641. **Effect of a Forfeiture of the Shares of One Induced to Subscribe through Fraud.**— One induced by a fraudulent prospectus to apply for an allotment of shares in a corporation, which are afterwards forfeited by his failure to pay calls, ceases to be a shareholder and becomes a mere debtor to the company, and if he has done nothing to affirm the contract he may, in an action for calls, repudiate the obligation on the ground of the fraud.²⁷

²⁵ *Weisiger v. Richmond Ice Mach. Co.*, 90 Va. 795; s. c. 20 S. E. Rep. 361.

²⁶ *Stufflebeam v. De Lashmutt*, 83 Fed. Rep. 449; distinguishing *Waite v. Dowley*, 94 U. S. 527; s. c. 24 L. ed. 181; *Pauly v. State Loan Trust Co.*, 165 U. S. 606; s. c. 41 L. ed. 844. That a subscriber who is entitled, by right, to repudiate his subscription immediately upon discovering the fraud, does not reaffirm it by giving his check to a director of the corporation, accompanied by the statement that he will never give another dollar towards his subscription to the stock, and that the check is given to save the money already paid therein,— see *Fear v. Bartlett*, 81 Md. 435; s. c.

33 L. R. A. 721; 32 Atl. Rep. 322. That fraud is not available as a defense to a member of a mutual insurance company who has had the benefit of the insurance, as against the rights of creditors of the corporation,— see *Mansfield v. Woods*, (Ohio C. P.) 29 Ohio L. J. 111. That a delay of two years and a half in disaffirming cuts off the right where an assignment for the benefit of creditors has supervened,— see *Painesville Nat. Bank v. King Varnish Co.*, (Ohio C. C.) 1 Toledo Leg. News, 304.

²⁷ *Aaron's Reefs v. Twiss* (H. L. (I.)) (1896) A. C. 273; s. c. 65 L. J. P. C. (N. S.) 54; 74 Law T. Rep. 794; aff'g s. c. (1895) 2 I. R. 207.

CHAPTER CXXXII.

PAYMENT FOR SHARES IN PROPERTY.

SECTION	SECTION
8643. Payment of shares in property at "money's worth."	8649. Courts which proceed on the "good faith rule."
8644. In what commodities payment may be made.	8650. What over-valuations have been held fraudulent.
8645. Effect of issuing shares of new corporation in exchange for shares of old.	8651. What overvaluations have been held not fraudulent.
8646. Distinction between the "true value rule" and the "good faith rule."	8652. Payment in property the title to which fails.
8647. Courts which adhere to the "true value rule."	8653. Corporations cannot issue their shares at a discount.
8648. Whether a knowledge of creditors as to the manner in which shares have been paid for affects their rights.	8654. Rule as between the corporation and the subscriber.
	8655. English statute requiring a registry of the contract where shares are not to be paid for in full.

§ 8643. Payment of Shares in Property at "Money's Worth."—

The doctrine remains that a corporation may accept payment of its shares in any property other than money, which it may lawfully purchase,¹ and need not go through the inconvenient form of collecting payment for its shares in cash, and then turning round and paying the money back to the same persons for property which it needs and which it may rightfully acquire, hold, and use, provided the property is turned into the corporation at a fair valuation.² One court has gone so far as to hold that circumstances may exist under which a corporation organized to supply a village with water may make a valid contract to issue its entire capital stock, except a few shares already issued, in payment for the construction of its plant and the acquisition of the property and rights necessary to its operation.³ The *good-will* of a business is held to be prop-

¹ Malone v. Lancaster Gas Light &c. Co., 14 Lanc. L. Rev. (Pa.) 225.

² Shannon v. Stevenson, 173 Pa. St. 419; s. c. 37 W. N. C. (Pa.) 537.

³ Drake v. New York Suburban Water Co., 26 App. Div. 499; s. c. 50 N. Y. Supp. 826. The contract was executed on *both* sides.

erty for which stock of a corporation may be issued under a statute providing that no stock shall be issued for less than its par value and except for money, labor done, or property actually received for the use and lawful purposes of the corporation.⁴ A statute prohibiting the issue of shares except for money, labor done or money or property *actually received*, has been construed to allow the issue of paid-up shares for services *agreed to be performed* in the future, as well as for services already performed.⁵ The English Court of Appeal have recently held, reviewing the previous recent judgments in that country on this question, that, although a limited company cannot release a shareholder from the obligation to pay for his shares either in money or in money's worth, and cannot, therefore, issue its shares at a discount,—yet it can, provided the contract is duly registered under the statute,⁶ buy property at any price it thinks fit, and pay for such property in fully-paid-up shares; and that the transaction will be valid and binding upon its creditors if the company has acted in it honestly and not colorably, and has not been so imposed upon by the vendor as to be entitled to be relieved of its bargain; and further, that the value received by the company is measured by the price at which the company agreed to buy the property, and that this is the only value which the court can take into consideration, so long as the title to the property remains unimpeached.⁷ It cannot escape attention that the two propositions that a company cannot issue its shares at less than par, but can sell them for property at any valuation which the company and the other contracting party may affix to the property, contradict each other; that the latter proposition amounts to nothing more than the holding that a company can create value by saying that certain property has a certain value; and that the proposition that a company may issue its shares at any valuation which may be agreed upon is totally subversive of the rights of creditors, and clearly contradicts the earlier and sounder decisions rendered in that country on the subject. Circumstances may, however, arise where the question of the power of a corporation so to issue its shares will not be inquired into. For example, a corporation which has issued stock to a person in exchange for property of *some value* cannot, as

⁴ Washburn v. National Wall Paper Co., 81 Fed. Rep. 17; s. c. 51 U. S. App. 380; 14 Nat. Corp. Rep. 511.

⁶ Companies Act 1867, § 25.

⁵ Shannon v. Stevenson, 173 Pa. St. 419; s. c. 37 W. N. C. (Pa.) 537; 34 Atl. Rep. 218.

⁷ Re Wragg, (1897) 1 Ch. 796; s. c. 66 L. J. Ch. (N. S.) 419; 75 Law T. Rep. 652; 76 Law T. Rep. 397.

against him or one who has purchased it from him, deny the validity of the stock for lack of payment.⁸ So, a purchaser of "treasury stock" from a corporation cannot avoid liability for the purchase price on the ground that the corporation did not receive the full par value of the stock from the stockholders to whom it was originally issued and who subsequently donated it to the corporation, where it was issued as fully-paid non-assessable stock, and the purchaser was fully apprised of the nature and extent of the consideration originally paid for it. "The transaction, though not conclusive as against the creditors of the plaintiff, was conclusive as between it and the taker of its shares."⁹

§ 8644. In What Commodities Payment May be Made.—In the absence of a statutory prohibition, the shares of a corporation may be paid for in any kind of property, labor, services, or other commodity such as a corporation may lawfully receive and pay for in money;¹⁰ and where such commodity is turned into the corporation at a fair valuation,¹¹ or where no issue is made as to its value,¹² the shares are deemed to be paid for to the extent to which it was agreed that the commodity should be deemed payment. It is not at all necessary that the property should be *tangible*. It may be an incorporeal hereditament, such as the right to take minerals from land; and this right may be transferred at a fair valuation to a mining company in exchange for its shares.¹³ It may be, and often is, the work, labor, skill and materials furnished by *contractors* who undertake to construct the works of the corporation,—in which case, where the work agreed to be done by the contractor has been accepted by the corporation in payment for the shares,

⁸ Roll v. St. Louis &c. Min. Co., 52 Mo. App. 60, 68.

⁹ Standard Matrix Mach. Co. v. Hills, 68 Mo. App. 249, 254. *Rectifying the register* where paid-up shares were allotted, but by a mistake the contract of allotment was not filed until the shares were issued, etc.: Re Preservation Syndicate, (1895) 2 Ch. 768; s. c. 64 L. J. Ch. (N. S.) 723; 73 Law T. Rep. 341. An issue of certificates of stock in number within the limits of the company's charter, but for amounts in excess of the money paid in, does not render the stock void as against creditors of the corporation, under Tex. Const. art. 12, § 6, providing that all fictitious increase of

stock or indebtedness shall be void. The court say that, while the corporation so issuing the shares, cannot collect the unpaid balance, its creditors may: Nenny v. Waddill, 6 Tex. Civ. App. 244; s. c. 8 Nat. Corp. Rep. 68; 25 S. W. Rep. 308.

¹⁰ Hastings Malting Co. v. Iron Range Brew. Co., 65 Minn. 28, 33; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 264; 67 N. W. Rep. 652.

¹¹ Mercer v. Park City Mineral Water Co., 18 Ky. L. Rep. 985; s. c. 38 S. W. Rep. 841.

¹² Elderkin v. Peterson, 8 Wash. 674; s. c. 36 Pac. Rep. 1089.

¹³ Shepard v. Drake, 61 Mo. App. 134; s. c. 1 Mo. App. Rep. 138.

the shares cannot be made assessable, in the absence of fraud — at least as between the corporation and the original sharetaker — on the ground that the work was defectively done.¹⁴ In Michigan, full-paid shares cannot be issued to a person in exchange for his *influence* in promoting the sale of the goods which the corporation is organized to manufacture,¹⁵ though in Missouri the rule seems to be the reverse.¹⁶

§ 8645. **Effect of Issuing Shares of New Corporation in Exchange for Shares of Old.**— While a corporation may issue its shares in payment for any commodity which it may lawfully acquire, and may agree with the subscribers to its shares as to the value at which such property shall be received in payment, yet such an agreement, in order to be binding, must be a real contract of bargain and sale, made in good faith and in the exercise of a fair and honest judgment. A transfer of all the assets of a corporation to a new company in consideration of its assuming the indebtedness of the old one and exchanging its stock, share for share, for that of the old company, thereby giving each shareholder the same relation to the property that he previously sustained, does not constitute a contract of bargain and sale of the assets, or establish that their value is sufficient to pay for the new stock in full. Shares of a new company issued in exchange, share for share, for that of a company existing under the laws of another state, without any payment therefor except the transfer of the old company's stock and assets, when this is done to evade the liability of stockholders under the laws governing the original company, will be deemed paid, as against the creditors of the old company, only to the extent that the actual value of the property actually received from the old company exceeded the sum of its indebtedness.¹⁷

§ 8646. **Distinction between the "True Value Rule" and the "Good Faith Rule."**— Our readers will recall that there are two

¹⁴ Riverton Water Co. v. Hummel, 175 Pa. St. 575; s. c. 34 Atl. Rep. 851. Circumstances under which the shares issued under statutory authority by the purchasers of the property and franchises of the corporation at a foreclosure sale, upon a reincorporation are to be deemed full-paid,—

see Wells v. Green Bay &c. Canal Co., 90 Wis. 442; s. c. 64 N. W. Rep. 69.

¹⁵ Peninsular Sav. Bank v. Black Flag &c. Co., 105 Mich. 535; s. c. 2 Det. L. N. 133; 63 N. W. Rep. 514.

¹⁶ Liebke v. Knapp, 79 Mo. 22.

¹⁷ Sprague v. National Bank of America, 172 Ill. 149; s. c. 50 N. E. Rep. 19; aff'g s. c. 66 Ill. App. 320.

rules on this subject, one of which the writer has elsewhere called "the true value rule,"¹⁸ and the other "the good faith rule."¹⁹ The former rule demands that when shares are paid for in property, the property must be turned in at a fair valuation,—in other words, that the shares must be paid for "in money or in money's worth." It proceeds upon the ground that the State grants to a body of incorporated adventurers an immunity from the payment of their own debts on the condition, and no other, that they will create a joint capital or fund, which shall be fairly and fully filled up, and which shall be what it purports to be, which capital or fund is to take the place of their individual credit, and answer for the debts which they create in managing the joint business; and that, on grounds of public policy, and having regard to the rights of creditors, they stand under the obligation of seeing that this fund is what it purports to be, and that there is no difference between the real and the ostensible capital on the basis of which they seek to obtain credit. Under this rule, where the shares of a corporation are paid for in property, the property must be turned in, in payment for the shares, at its real value at the time, and not at a value determined by speculative optimism; and if it is not of the real value at which it is so turned in, the shareholders must pay the difference in favor of creditors. Under this rule, an over-valuation of the property turned in will make the shareholder liable whether it be the result of fraud, mistake or bad judgment. The other rule I call "the good faith rule,"—an expression which has been used to cloak and condone more actual fraud than any word in our language. It is to the effect that, in determining the value at which property may be received by a corporation in payment for its shares, whatever valuation the parties to the transaction choose to put upon it, is conclusively to be deemed its valuation, provided they act "in good faith;" and, conversely, that actual fraud is necessary in order to make the shareholders liable for the difference between the real and the pretended value of the property, in favor of creditors of the corporation. This rule concedes that a gross over-valuation of the property received in payment for the shares is evidence of actual fraud. But the rule has this infirmity: it fails to state *against whom* the actual fraud must be committed in order to make it an insufficient payment. If the buyer and seller deal fairly with *each other*, where is there any ground for an imputation

of actual fraud? Is it that they are conspiring to cheat future creditors of the corporation? The inference is strained and remote. If two parties to a bargain deal fairly with each other, is there any rule of law or of equity which will set aside their bargain on the ground that the law raises an inference that they intended to cheat some remote, future, or possible person? "The good faith rule" is thus shown to be the very essence of nonsense, unless the "actual fraud" which it requires is that kind of fraud which is sometimes called "a fraud on the law." But no court has yet confounded "actual fraud" with that somewhat vague thing called "fraud on the law." If "fraud on the law" is to be the standard, that brings us back to the "true value rule;" for, whereas the rule requires shares to be issued for property, labor, etc., at a fair valuation, any over-valuation of the property, labor, etc., or under-valuation of the shares, is a "fraud on the law." The "good faith rule," as administered in the courts, comes practically to this,—that whatever the body of adventurers, desiring to make something out of nothing, choose to call value in "stocking property,"—to use the slang of such persons,—is value. It was the doctrine of the Stoics that a man never suffers so long as he can persuade himself that he is happy; that he is never hungry so long as he can imagine that his belly is full.

§ 8647. Courts which Adhere to the "True Value Rule."—In the cases cited in the margin, the courts have adhered to the "true value rule" as to the payment of shares, which is, that where payment is made in property, labor, services, or in anything other than money, the commodity must be turned in at its true value at the time, and that an over-valuation of it, or an under-valuation of the shares, leaves the shares unpaid to that extent, and the shareholders liable to make up the deficiency in favor of creditors of the corporation, without regard to the question whether the discrepancy was the result of fraud, mistake, bad judgment, or a cheerful optimism.²⁰

²⁰ *Shepard v. Drake*, 61 Mo. App. 134; s. c. 1 Mo. App. Rep. 138; *Roman v. Dimmick*, 115 Ala. 233; s. c. 14 Nat. Corp. Rep. 871; 22 South. Rep. 109; 7 Am. & Eng. Corp. Cas. (N. S.) 439; *Thayer v. El Plomo Min. Co.*, 40 Ill. App. 344; *National Bank of America v. Pacific R. Co.*, 66 Ill. App. 320; s. c. 12 Nat. Corp. Rep. 572; *Salt Lake Hardw. Co. v. Tintic Mill. Co.*, 13 Utah, 423; s. c. 45 Pac. Rep. 200; 4 Am. & Eng. Corp. Cas. (N. S.) 224; *Gates v. Tippecanoe Stone Co.*, 9 Ohio C. C. 99; s. c. 2 Ohio Dec. 37; s. c. aff'd, 48 N. E. Rep. 295. In *Woolfolk v. January*, 131 Mo. 620, the Supreme Court of Missouri, departing from its former doctrine,

§ 8648. **Whether a Knowledge of Creditors as to the Manner in which Shares Have Been Paid for Affects their Rights.**—The sound doctrine on this subject makes the rule that shares are to be paid for in money or money's worth a rule of public policy, especially where such is the requirement of the constitutional or statutory law; consequently, under this rule, the right of a creditor of the corporation to enforce the liability of its shareholders who have not paid their subscriptions in full is not dependent in any degree upon the fact of his knowledge, at the time of extending the credit, that such subscriptions were or were not paid in full;²¹ though this, it is to be regretted, is not the doctrine of all the courts.²²

§ 8649. **Courts which Proceed on the "Good Faith Rule."**—On the other hand, the courts whose decisions are cited in the margin proceed on the rule which, variously expressed, is that, unless the over-valuation of the property, labor, etc., turned in in payment for the shares, is intentional, that is, over-valued to the knowledge of the parties to the transaction, or is actually fraudulent, or so gross as to be constructively fraudulent,—the value at which it was turned in in payment is to be deemed payment, and the shares are to be deemed to have been paid up to that extent, and the shareholders are protected from further assessment in respect of such payment, even in favor of creditors.²³ In Minnesota it has been well held that "stockholders cannot be heard to say, after

adopted the "good faith rule." Subsequently, in *Van Cleve v. Berkey*, 143 Mo. 109, in an able and convincing opinion by Brace, J., it reinstated the "true value rule." See also *Altенberg v. Grant*, 85 Fed. Rep. 345; reversing s. c. 83 Fed. Rep. 980.

²¹ *Sprague v. National Bank of America*, 172 Ill. 149; s. c. 50 N. E. Rep. 19; aff'g s. c. 66 Ill. App. 320.

²² *Adamant Man. Co. v. Wallace*, 16 Wash. 614; s. c. 48 Pac. Rep. 415.

²³ *Powers v. Knapp*, 85 Hun (N. Y.) 38; s. c. 66 N. Y. St. Rep. 133; 32 N. Y. Supp. 622; *Jones v. Whitworth*, 94 Tenn. 602; s. c. 30 S. W. Rep. 736; *Rickerson Roller-Mill Co. v. Farrell Foundry & Co.*, 75 Fed. Rep. 554; s. c. 43 U. S. App. 452; *American Tube & Co. v. Hays*, 165 Pa. St. 489; s. c. 35 W. N. O. (Pa.) 530; 25 Pitts. L. J. (N. S.) 374; 30 Atl. Rep. 936; *Northwestern & C. Ins. Co. v. Cotton Exch. & Co.*, 70 Fed. Rep. 155;

s. c. 1 Am. & Eng. Corp. Cas. (N. S.) 633; *Re Hess Man. Co.*, 23 Can. S. C. 644; *Clow v. Brown*, (Ind.) 31 N. E. Rep. 361; *Bruner v. Brown*, 139 Ind. 600; s. c. 38 N. E. Rep. 318; *Gilkie & Co. v. Dawson Town & Co.*, 46 Neb. 333; s. c. 64 N. W. Rep. 978, 1097; *Morse v. Pacific R. Co.*, 11 Nat. Corp. Rep. 671; s. c. 28 Chicago Leg. News, 202; 1 Chic. L. J. Wkly. 71; *Turner v. Bailey*, 12 Wash. 634; s. c. 11 Nat. Corp. Rep. 339; 42 Pac. Rep. 115; *Manhattan Trust Co. v. Seattle Coal & Co.*, 16 Wash. 499; s. c. 48 Pac. Rep. 333; rehearing denied in 48 Pac. Rep. 737; *Kelley Bros. v. Fletcher*, 94 Tenn. 1; s. c. 28 S. W. Rep. 1099; *Streator Reclining Car-Seat Co. v. Rankin*, 45 Ill. App. 226. Compare *Larocque v. Beauchemin*, 66 L. J. P. C. (N. S.) 59; *Kroenert v. Johnston* (Wash.) 52 Pac. Rep. 605; *Troup v. Horbach*, 74 N. W. Rep. 326.

creditors have trusted the corporation on the basis of its apparent paid-up capital and the corporation has become insolvent, that they acted in good faith, without any intention to defraud any creditor. The law presumes an intention in such cases to defraud. Where property at a gross over-valuation is given and accepted for paid-up stock, the question of fraud is usually one of fact. But there may be cases where the property was of such a character, and the over-valuation so great as to exclude any possibility of an honest mistake. In such cases it would be the duty of the court to declare the transaction fraudulent as to creditors. Upon principle and authority, we hold that a corporation, unless prohibited by some statutory or constitutional provision, may, in good faith, issue paid-up shares of its stock for the purchase of property at a fair valuation; and in such case, both the corporation and its creditors will be bound thereby. But if there is a material over-valuation of the property, *to the knowledge of the contracting parties*, the transaction is a fraud as to subsequent creditors of the corporation without notice; and if it becomes insolvent, the shareholders so paying for their stock, will be charged in equity, to the extent necessary to pay such creditors, with the difference between the real value of the property and the par value of their stock."²⁴

§ 8650. What Over-Valuations have been Held Fraudulent.—

Within the meaning of the foregoing rule, property delivered to a corporation in payment for its shares is deemed to have been fraudulently over-valued, so that the shares are deemed to have been paid for only to the extent of the fair value of the property at the time, and are assessable in favor of creditors for the difference between such fair valuation and the par value of the shares,—where there is a gross over-valuation to the knowledge of the share-taker;²⁵ where the over-valuation is so gross as, in the absence of an explanation, creates on the face of the transaction, an inference of fraudulent intent;²⁶ especially where viewed in connection with the other facts of the case;²⁷—as where a corporation, for the pur-

²⁴ *Hastings Malting Co. v. Iron Range Brew. Co.*, 65 Minn. 28, 33; s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 264; 67 N. W. Rep. 652.

²⁵ *Wishard v. Hansen*, 99 Iowa, 307; s. c. 5 Am. & Eng. Corp. Cas. (N. S.) 437; 68 N. W. Rep. 691; 61 Am. St. Rep. 238; *Hastings Malting Co. v. Iron Range Brew. Co.*, 65 Minn. 28, 33;

s. c. 4 Am. & Eng. Corp. Cas. (N. S.) 264; 67 N. W. Rep. 652.

²⁶ *Coleman v. Howe*, 154 Ill. 458; s. c. 39 N. E. Rep. 725; aff'g s. c. 53 Ill. App. 82.

²⁷ *Lloyd v. Preston*, 146 U. S. 630; s. c. 36 L. ed. 1111; 13 Sup. Ct. Rep. 131; 40 Am. & Eng. Corp. Cas. 276.

pose of enabling a subscriber to get his shares at less than par, buys from him a worthless patent right and afterward resells it to him for a nominal sum,—the transaction being a mere evasion of the statutory requirement that the shares are to be sold at par;²⁸ or where “paid-up shares” to the amount of \$300,000 were issued in exchange for property of the well-understood value of no more than \$75,000.²⁹

§ 8651. What Over-Valuations have been Held not Fraudulent.—

Decisions are met with which exhibit no better basis for the conclusion of the court that shares partly paid for in property are to be deemed as having been fully paid, than the conception that what is called full payment — especially if accompanied by some sort of *legerdemain* — is full payment. In one of these cases, shares to the extent of \$1,000,000 were issued for property worth \$220,000, and this passed the scrutiny of a cheerful and complaisant court.³⁰ The fact that one who exchanges property for the shares of a corporation *makes a profit* out of the transaction, he not being a promoter, director or other official of the corporation, constitutes neither fraud nor evidence of fraud. In all such cases the question is what was the property really worth at the time when he turned it in to the company, and not what he gave for it, or whether he gave anything for it.³¹

²⁸ Peck v. Elliott, 79 Fed. Rep. 10; s. c. 47 U. S. App. 605; 38 L. R. A. 616; 24 C. C. A. 425.

²⁹ Coleman v. Howe, 154 Ill. 458; s. c. 39 N. E. Rep. 725; aff'g s. c. 53 Ill. App. 82. That, as between shareholders, the *validity or ownership* of the shares issued by a corporation in consideration of property transferred to it is not affected by false representations of the seller as to the value of his property, made to the persons forming the corporation, although the fraud might have been cause for rescission of their contract or the winding up of the corporation,—see West v. Huiskamp, 63 Fed. Rep. 749; s. c. 11 C. C. A. 401. That, as between stockholders, the title to stock issued in consideration of property turned over to a corporation is not affected by the fact that the holder obtained the property on a credit and had not paid for it, and afterwards, as president and manager of the corporation,

used its money to pay such debt; nor do the other stockholders thereby become entitled to such stock on the ground that they alone paid what was paid for the property,—see West v. Huiskamp, 63 Fed. Rep. 749; s. c. 11 C. C. A. 401.

³⁰ Rood v. Whorton, 74 Fed. Rep. 118; s. c. 20 C. C. A. 332; 46 U. S. App. 6. Compare the equally unsatisfactory case of Giddings v. Holter, 19 Mont. 263; s. c. 48 Pac. Rep. 8,—where the question was whether directors who had reported, in the report required by statute, that the shares of the corporation were paid in full, when they had been paid in town lots carved out of a recent government land entry which was annulled by the government land office, made a false report.

³¹ Grant v. East & Co. R. Co., 54 Fed. Rep. 569; Re Wraggs, (1897) 1 Ch. 796; s. c. 66 L. J. Ch. (N. S.) 419; 75 Law T. Rep. 652; 76 Law T. Rep.

§ 8652. **Payment in Property the Title to which Fails.**— Under the “true value rule,” quitclaim deeds to a corporation, by subscribers to its shares of lands in which they erroneously supposed they had an interest, cannot constitute a valid payment for their stock as against creditors of the corporation.³²

§ 8653. **Corporations Cannot Issue their Shares at a Discount.**— In England the doctrine still obtains — the only doctrine compatible with business honesty and the rights of the public — that a corporation cannot issue its shares at a discount.³³ It cannot do this even for the limited purpose of adjusting the rights of contributories among themselves, after the claims of creditors and the cost of winding up have been satisfied.³⁴ For stronger reasons, it cannot give away its shares,— that is, issue them to its shareholders as a “*bonus*,” though this is attempted “in good faith,” and though the transaction is publicly registered under the provisions of the statute.³⁵ There are, however, statutes which have been judicially construed as conferring this power. Thus, the English Court of Appeal have held that a company governed by the English Companies Clauses Consolidation Act, 1845, and the Acts amending it, may issue fully paid-up shares at a discount, and for payment either in cash, lands, labor, or other consideration, subject to the liability of the directors for issuing the stock below its value without necessity, and may also issue debentures or debenture stock at a discount, if authorized to borrow money or raise money by a mortgage or debenture.³⁶ So, the Court of Kings Bench of Manitoba have construed a statute of that province as conferring the power upon the directors of a corporation to issue its shares at a discount without authority of a general meeting of the shareholders, so far as the company and the shareholders are concerned, if the issue is *bona fide* and the discount is not greater than has been fixed by a

397; *Russell v. Rock Run Fuel Gas Co.*, 184 Pa. St. 102; s. c. 41 W. N. C. (Pa.) 364; 39 Atl. Rep. 21; 7 Am. & Eng. Corp. Cas. (N. S.) 456. Compare *Thomson-Houston Electric Co. v. Dallas & C. R. Co.*, 54 Fed. Rep. 1001.

³² *Henderson c. Turngren*, 9 Utah, 432; s. c. 35 Pac. Rep. 495. But compare *Giddings v. Holter*, 19 Mont. 263; s. c. 48 Pac. Rep. 263. That the title to shares issued in payment for property is not affected by the fact that the sharetaker obtained the

property on credit and had not paid for it, with a good many other complications in a squabble among stockholders,— see *West v. Huiskamp*, 63 Fed. Rep. 749; s. c. 11 C. C. A. 401.

³³ *Welton v. Saffery*, (H. L.) 66 L. J. Ch. (N. S.) 362.

³⁴ *Welton v. Saffery*, (H. L.) 66 L. J. Ch. (N. S.) 362.

³⁵ *Re Eddystone Marine Ins. Co.*, (C. A.) (1893) 3 Ch. 9.

³⁶ *Webb v. Shropshire R. Co.*, (C. A.) (1893) 3 Ch. 307.

resolution passed at a general meeting. The court did not decide whether this could be done as against creditors.³⁷

§ 8654. Rule as Between the Corporation and the Subscriber.—

As between the corporation and the subscriber, the question is not generally treated as one of public policy; and hence, as between the sharetaker and the corporation, an agreement whereby shares are to be taken by him at less than their par value,³⁸ or at a discount,³⁹ or on payment in property or any other commodity at an overvaluation,⁴⁰ is valid, though not binding upon its creditors.⁴¹ And this rule obtains although persons subsequently, in good faith and for a full consideration, become stockholders without any knowledge of, or acquiescence in, the illegal act.⁴² As such a transaction estops the corporation, it also estops other stockholders, at least where the nature of the transaction is known to them and they do not dissent at the time.⁴³

³⁷ *Walsh v. North West Electric Co.*, 11 Manitoba, 629; distinguishing *Daniell's Case*, 22 Beav. 46. That a charter provision that no by-law for the allotment or sale of stock at any greater discount than has been previously authorized at a general meeting, shall be valid, does not impliedly authorize the allowance of a discount on shares originally subscribed for at their full nominal value, in an attempt to make them paid-up shares,—see *Re Ontario Exp. &c. Co.*, 21 Ont. App. 646; reversing s. c. 24 Ont. 216. That a *street railway company* is within Pa. Const., art. 16, § 7, providing that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received,—see *Cheetham v. McCormick*, 178 Pa. St. 186; s. c. 35 Atl. Rep. 631; aff'g s. c. 38 W. N. O. (Pa.) 124. That a *street railway company* is within Pa. Act 1887, No. 44, providing that no "railway corporation" shall issue or authorize the issue of any stock of the corporation for less than its par value, which par value in money shall be actually paid into the treasury before the stock shall issue,—see *Cheetham v. McCormick*, 178 Pa. St. 186; s. c. 35 Atl. Rep. 631; aff'g s. c. 38 W. N. O. (Pa.) 124.

³⁸ *Roll v. St. Louis &c. Co.*, 52 Mo. App. 60.

³⁹ *Webb v. Shropshire R. Co.*, (1893) 3 Ch. 307; *Hebberd v. Southwestern Land &c. Co.*, 55 N. J. Eq. 18; s. c. 36 Atl. Rep. 122.

⁴⁰ *Wells v. Green Bay &c. Canal Co.*, 90 Wis. 442; s. c. 64 N. W. Rep. 69; *Krohn v. Williamson*, 62 Fed. Rep. 869; s. c. 32 Ohio L. J. 301; *Hadley v. Hadley*, (Ch.) 77 Law T. Rep. 131; *Higgins v. Lansing*, 154 Ill. 301; s. c. 40 N. E. Rep. 362.

⁴¹ *Hebberd v. Southwestern Land &c. Co.*, *supra*. That a subscription to stock payable in property at a fictitious valuation, though void as to the company because in violation of Ala. Const., art. 14, § 6, and Ala. Code, § 1662, is enforceable in favor of the company's creditors,—see *Joseph v. Davis*, (Ala.) 10 South. Rep. 830.

⁴² *Miller v. University Magazine Co.*, 10 Misc. (N. Y.) 311; s. c. 63 N. Y. St. Rep. 128; 30 N. Y. Supp. 969; 27 Chicago Leg. News, 132.

⁴³ *Northern Trust Co. v. Columbia Straw Paper Co.*, 75 Fed. Rep. 936; s. c. 28 Chicago Leg. News, 367. That *laches*, acquiescence, and acts of ratification, covering a period of twenty years will cut off any right of action for a rescission which the corporation might otherwise have,—see *Higgins v. Lansing*, 154 Ill. 301; s. c. 40 N. E. Rep. 362.

§ 8655. **English Statute Requiring a Registry of the Contract where Shares are Not to be Paid for in Full.**—There is an English statute providing as follows: “Every share in any company shall be deemed and taken to have been issued and to be subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint stock companies at or before the issue of such shares.”⁴⁴ The document filed must show the consideration for the shares to be issued, although it is not necessary that the consideration be stated with full particularity.⁴⁵ It is insufficient where it only identifies the consideration for the shares to be issued by reference to another contract not filed.⁴⁶ So, the filing of a contract which merely refers to an unregistered contract showing such consideration, is not a sufficient compliance with the statutory mandate.⁴⁷ The allottee of shares will not be relieved from his obligation to pay their par value by a compliance with this statute, where the consideration rendered by him for them was elusory, or where a discount was allowed him; but the court may inquire in each case whether the price paid was reasonable, or whether what was given for the shares had a cash value in the market equal to their nominal value.⁴⁸

⁴⁴ Companies Act 1876, § 25.

⁴⁵ Re Kharaskhoma Exploring &c. Syndicate, (C. A.) [1897] 2 Ch. 451; s. c. 66 L. J. Ch. (N. S.) 675.

⁴⁶ Re Kharaskhoma Exploring &c. Syndicate, (C. A.) [1897] 2 Ch. 451; s. c. 66 L. J. Ch. (N. S.) 675.

⁴⁷ Re Kharaskhoma Exploring &c. Syndicate, (C. A.) [1897] 2 Ch. 451; s. c. 77 Law T. Rep. 82.

⁴⁸ Re Theatrical Trust, [1895] 1 Ch. 771; s. c. 64 L. J. Ch. (N. S.) 488. For the construction of a similar statute of New South Wales, see *Smith v. Brown*, (P. C.) (1896) A. C. 614; s. c. 75 Law T. Rep. 213; 65 L. J. P. C. (N. S.) 89. Compare *Hartney's Case*,

L. R. 10 Ch. 157. To satisfy the English statute above quoted, the contract which is so filed need not be made directly between the allottee of the shares and the company, or show on its face which particular shares are to be allotted; but an agreement by which the company, in consideration of the transfer to it of the rights or property of another company, is to allot to the shareholders of the latter company paid-up shares of its own, is sufficient: *Re Common Petroleum Engine Co.*, (1895) 2 Ch. 759; s. c. 65 L. J. Ch. (N. S.) 76; 73 Law T. Rep. 338.

CHAPTER CCXXXIII.

ASSESSMENTS AND CALLS.

SECTION	SECTION
8658. Distinction between an assessment and a call.	8671. Assessments must be made formally by the directors — not on the street.
8659. When assessment necessary, when not.	8672. Whether notice of the assessment necessary before action.
8660. Assessments cannot be made before organization.	8673. When by-law must be followed in giving notice.
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8662. Directors cannot assess full-paid stock unless empowered by statute.	8675. Notice how served in case of a deceased shareholder.
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8664. When persons named in the charter as shareholders are liable for calls.	8677. Validity of by-law providing for sales of shares to enforce assessments.
8665. No right to assess shareholders in respect of shares lawfully bought in by the corporation.	8678. Notice of sale of shares to enforce assessment.
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§ 8658. *Distinction Between an Assessment and a Call.*— Properly speaking, an *assessment* is an act or resolution of the board of directors of a corporation determining that a certain percentage of the unpaid capital stock owned by the shareholders should be

called in. A *call* is a notice given to the shareholders of the fact of the assessment, a call upon them to respond to it. Nevertheless, these two words, although really meaning different things, are constantly confused in legal treatises and judicial opinions.¹

§ 8659. **When Assessment Necessary — when Not.**— Where, as is usually the case, the contract of subscription, or, in its silence, the governing statute, expresses an obligation to pay at such times and in such amounts as the directors may, from time to time, order,— a stockholder is not liable to pay anything until a valid assessment has been made by the directors and until he has received due notice of it.² It is equally obvious that the governing statute or contract of subscription may be such that the whole amount subscribed for will be presently due and payable, without the necessity of any formal call, or even of any demand for the whole or any part of it by the directors; but that they may sue for it at once without any previous demand, the bringing of the action being in theory of law a sufficient demand.³

§ 8660. **Assessments Cannot be Made before Organization.**— An assessment or call of course implies the existence of a body capable of making it; and this, in the absence of a special contract on the part of the shareholders to pay otherwise, is always the board of directors or trustees, or the governing board of the corporation, by whatever name called. From this it follows that no legal call can be made prior to the organization of the corporation, because until then there is no board of directors capable of making a call.⁴ Undoubtedly the co-adventurers may agree among themselves to pay into a common fund a given amount prior to the organization of the corporation, and this agreement would create enforceable rights *inter sese*, making each liable to the others on his promise.

§ 8661. **When Assessments Can Be Made Before All Shares Subscribed.**— Where a scheme of subscription contemplates the raising of a *definite fund*, no subscription is enforceable until the whole

¹ See *Gary v. York Mining Co.*, 9 Utah, 464; s. c. 35 Pac. Rep. 494.

² *Great Western Teleg. Co. v. Barker*, 56 Ill. App. 402; *Halifax Carrette*

Co. v. Moir, 28 N. S. 45; *Re Cawley & Co.*, 42 Ch. Div. 209, 228.

³ See *post*, § 8659.

⁴ *Halifax Carrette Co. v. Moir*, 28 N. S. 45.

fund has been subscribed for in good faith by competent persons.⁵ There are statutory exceptions to this rule, such as that existing under the Civil Code of California,⁶ permitting an assessment when one-fourth of the shares have been subscribed for. But in such cases the parties contract with reference to the statute, and it reads itself into their contract and becomes a part of it. So, it has been held that a corporation, whose articles of association provide that the holders of shares for the time being, whatever the number issued or subscribed for, shall form the company, may make calls upon its stock, although the entire amount of stock has not been subscribed for, or the shares allotted.⁷ Under a statute of California, just referred to,⁸ the directors of a corporation cannot levy an assessment upon its shares until *one-fourth* of its capital stock has been subscribed, unless the terms of the subscription agreement otherwise provide.⁹

§ 8662. **Directors Cannot Assess Full-Paid Stock unless Empowered by Statute.**— In the absence of special authority conferred upon them by law, or of the assent of the shareholders evidenced in some form, the directors of a corporation have no power to assess shares which have been fully paid up.¹⁰ But they may assess full-paid shares where the governing statute, existing at the time of the formation of the corporation, gives them authority so to do. They may, for instance, under statutes of Utah,¹¹ assess shareholders whose shares have been fully paid up to raise money to pay a corporate indebtedness which there is no other means of paying, and may sell the stock of a subscriber upon his failure to pay the assessment.¹² With the above statutes in force, a provision in the articles of a private corporation, that no assessment of stockholders

⁵ *Ante*, § 8612.

⁶ Cal. Civ. Code, § 331.

⁷ *Mandel v. Swan Land & Co.*, 154 Ill. 177; s. c. 27 L. R. A. 313; 40 N. E. Rep. 462.

⁸ Cal. Civ. Code, § 331.

⁹ *Ventura & Co. R. Co. v. Hartman*, 116 Cal. 260; s. c. 48 Pac. Rep. 65; 6 Am. & Eng. Corp. Cas. (N. S.) 414. See also *San Bernardino & Co. v. Merrill*, 108 Cal. 490. That a call of its unpaid capital by an English limited company empowered by its memorandum of association to sell its undertaking for shares or securities of

any other similar company or for any other consideration, for the purpose of paying the amount to the purchasing company upon a sale of its undertaking, is not *ultra vires*,—see *New Zealand Gold Extraction Co. v. Peacock*, (C. A.) (1894) 1 Q. B. 622.

¹⁰ *Wells v. Green Bay & Canal Co.*, 90 Wis. 442; s. c. 64 N. W. Rep. 69; *Re Sovereign Life Ass. Co.*, (1892) 3 Ch. 279, 287.

¹¹ Comp. Laws Utah, 1888, §§ 2374, 2375, 2393.

¹² *Gary v. York Min. Co.*, 9 Utah, 464; s. c. 35 Pac. Rep. 494.

shall be levied until stock set apart to be used in developing the corporate business is exhausted, is binding on the directors; but if they are unable to sell the stock so reserved, after due effort to do so, they may levy an assessment to pay a corporate indebtedness which cannot otherwise be paid.¹³

§ 8663. Shareholders may Increase their Liability by Contract.—

Within the limits where public policy is not concerned, and subject to the rights of innocent persons dealing with the corporation, shareholders may vary, by contract, the liability which the governing statute imposes upon them, at least to the extent of increasing such liability¹⁴—as by agreeing that their shares shall be assessable where they would not be assessable under the governing statute.¹⁵ But clearly they cannot, without consent of the creditors of the corporation, *reduce* their liability so as to diminish the trust fund which the law has allowed them to create and to substitute in the place of their personal credit.¹⁶

§ 8664. When Persons Named in the Charter as Shareholders are Liable for Calls.— Persons named as shareholders in the charter of a corporation are liable as such for calls made afterwards upon the stock stated in the charter to be held by them, without further action by the directors in allotting such stock or giving them notice of allotment;¹⁷ provided always they are so named by their consent, expressly given, or implied from their conduct in suffering themselves to be so held out to the public and to other shareholders. The Canada case just cited does not sufficiently take this distinction, but holds that persons named as shareholders in a charter of incorporation are not relieved from liability upon calls subsequently made, by stating to some of the directors that they will not accept the stock and will have nothing more to do with the company, where they take no proceedings to relieve themselves from liability, although no proceedings are taken by the directors to enforce

¹³ Gary v. York Min. Co., 9 Utah, 464; s. c. 35 Pac. Rep. 494. Construction of California statute (Civ. Code Cal., § 322) limiting amount of assessment to ten per cent. with stated exceptions: Pacific Fruit Co. v. Coon, 107 Cal. 447; s. c. 40 Pac. Rep. 542.

¹⁴ West v. Crawford, 80 Cal. 19; Marysville Electric Light &c. Co. v. Johnson, 93 Cal. 538; s. c. 27 Am. St.

Rep. 215; Ventura &c. R. Co. v. Hartman, 116 Cal. 260, 263.

¹⁵ Marysville Electric Light &c. Co. v. Johnson, *supra*.

¹⁶ 2 Thomp. Corp., §§ 1548, 2054.

¹⁷ Re Haggert Bros. Man. Co., 19 Ont. App. 582; s. c. 40 Am. & Eng. Corp. Cas. 308; citing and following Re London Speaker Printing Co., 16 Ont. Rep. 508.

payment of the shares for eleven years, or until the company is wound up.¹⁸

§ 8665. No Right to Assess Shareholders in Respect of Shares Lawfully Bought in by the Corporation.—Shares purchased by a company, under statutory authority to purchase its own stock, are *extinguished*, and are not kept alive in the company as trustee for the shareholders so as to render the shareholders liable, upon the winding up of the company, to reimburse the company for a call upon the amount unpaid thereon, in addition to the amount unpaid on their own shares.¹⁹ A somewhat different view was that where shares were lawfully sold to enforce an assessment, and were bought in by the corporation, a shareholder of the corporation could not defend an action against him for an assessment, on the ground that the shares, so bought in and held by the corporation, were not also assessed. The contention was that an assessment, to be valid, must be laid upon all the shares without reference to the question who is the holder of them; but the court took the sensible view that, when they became the property of the corporation, they were represented by the shares outstanding in the shareholders, so that no prejudice could accrue to any shareholder from failing to include them in an assessment.²⁰

§ 8666. Assessments Must be Made Ratably upon All Shareholders of the Same Class.—An assessment, to be valid, must be made upon all the stockholders alike, who belong to the same class.²¹

§ 8667. Who Liable to Assessment Where Transfer of Shares is in Fieri.—Evidence that an assessment was made *on the same day* that the person sought to be charged therewith purchased the shares, has been held sufficient to show that it was made while he was the owner of them; since it will not be presumed that the assessment was made a *fraction of a day* before the purchase.²²

¹⁸ *Re Haggert Bros. Man. Co.*, 19 Ont. App. 582; s. c. 40 Am. & Eng. Corp. Cas. 303.

¹⁹ *Re Sovereign L. Assur. Co.*, (C. A.) (1892) 3 Ch. 279.

²⁰ *Western Improv. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455, 463; s. c. 72 N. W. Rep. 657. Stock deposited by the owner with the treasurer of the corporation to be sold and part of the proceeds to be returned

to them and the remainder loaned to the company and repaid by it is not "treasury stock," but the depositors are liable in respect of it as shareholders; *Lexow v. Pennsylvania Diamond Drill Co.*, 5 Pa. Dist. Rep. 491. ²¹ *Brockway v. Gadsden Mineral Land Co.*, 102 Ala. 620; s. c. 15 South. Rep. 431.

²² *San Gabriel Valley Land & C. Co. v. Dennis*, (Cal.) 34 Pac. Rep. 441.

§ 8668. **Validity of Assessments Made After an Injunction.**—Under a statute of Utah,²³ no assessment can be levied on the capital stock of a corporation until the power of the corporation has been exercised to collect any previous assessment which remains unpaid, unless the collection of the previous assessment has been enjoined. Where the collection of an assessment has been enjoined by a temporary restraining order issued upon an order to show cause why an injunction should not issue until the final determination of the suit, it does not affect the validity of the assessment, but merely suspends the power to collect it until the hearing of the order to show cause; and if, upon the day fixed for the hearing of such order, there is no appearance of the parties and no continuance of the hearing or of the motion for an injunction, the restraint upon the collection of the assessment is at an end.²⁴

§ 8669. **Whether Resolution of Assessment Must Fix Date and Place of Payment.**—When the obligation of the shareholders is to pay their subscriptions when and as the directors shall call for them, it is clear that a call, in order to be valid, should fix the *date* at which the sum called for is to be paid. If the governing instrument requires that the call should fix both the *date* and *place* of payment, that must be done.²⁵ But in the absence of a governing instrument requiring the call to fix the *place* of payment as well as the date, there would seem to be no propriety in holding a call invalid for failing to name a place of payment; since the proper place, in the absence of a different direction, would manifestly be the treasury of the company. Accordingly, it has been held that a call is not invalid because it does not name the time, place, or person to whom the payment is to be made, where the corporation has a place of business and an officer authorized to receive money due it; since the time, under such circumstances is, *on demand*, and the place the place of business of the corporation, and the person to whom payment is to be made, such officer.²⁶

²³ Comp. L. Utah 1888, § 3376.

²⁴ *Miles v. Sheep Rock Min. & Co.*, 15 Utah, 436; s. c. 49 Pac. Rep. 536; 7 Am. & Eng. Corp. Cas. (N. S.) 750.

²⁵ *Re Cawley*, 42 Ch. Div. 210, 228; *Halifax Carette Co. v. Moir*, 28 N. S. 45.

²⁶ *Western Improv. Co. v. Des Moines Nat. Bank*, 103 Iowa, 455, 465;

s. c. 72 N. W. Rep. 657; distinguish-
ing *Re Cawley*, 42 Ch. Div. 209; s. c. 31 Am. & Eng. Corp. Cas. 425; and *North & South Street R. Co. v. Spullock*, 88 Ga. 283; s. c. 14 S. E. Rep. 478. To the same effect, see *American Pastoral Co. v. Gurney*, 61 Fed. Rep. 41.

§ 8670. Rescinding Previous Assessment in order to Make New One.— Under the statute of Utah, just cited,²⁷ the board of directors of a corporation cannot, for the purpose of levying a new assessment, rescind a former assessment a part of which has been collected and a part not collected. Such action operates to release a part of the directors, and would constitute a breach of trust on the part of the directors.²⁸

§ 8671. Assessment Must Be Made Formally by the Directors — Not on the Street.— Calls must be made by appropriate and formal action by the directors and evidenced by the minutes of their proceedings, and cannot be made by mere street conversations between the president and the directors.²⁹

§ 8672. Whether Notice of the Assessment Necessary Before Action.— There is a holding by a respectable court to the effect that, in the absence of a statute or other governing instrument making a different rule, a contract of subscription to the shares of a corporation, where the subscriber promises to pay for the shares at such times and in such installments as the board of directors may by resolution require,— the usual form of such a subscription,— and where the contract of subscription does not stipulate that any *notice* is to be given to the subscriber as a condition precedent to his obligation to pay, if a valid resolution is passed, he becomes liable to pay without notice, and may be sued for an assessment so made, although no notice of it has been given him except the notice furnished by the citation in the action.³⁰ It has been well held that a stockholder will be presumed to have had knowledge of such stock assessments as were called while he was a director, and cannot defend an action to recover assessments on the ground that he did not have such knowledge.³¹

§ 8673. When By-Law Must be Followed in Giving Notice.— Where the governing statute³² authorized the directors to call in

²⁷ Comp. L. Utah, 1888, § 3376.

²⁸ *Miles v. Sheep Rock Min. & C. Co.*, 15 Utah, 436; s. c. 49 Pac. Rep. 536; 7 Am. & Eng. Corp. Cas. (N. S.) 750.

²⁹ *Branch v. Augusta Glass Works*, 95 Ga. 573, 579; s. c. 23 S. E. Rep. 128.

³⁰ *United Growers Co. v. Eisner*, 22

App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906; citing *Mor. Priv. Corp.*, § 147.

³¹ *Spellier Electric Time Co. v. Geiger*, 1 Pa. Adv. Rep. 214; s. c. 23 Atl. Rep. 547.

³² Rev. Stat. Wis., § 1754.

the capital stock "by giving such notice as the by-laws shall prescribe," this was held to supersede the common-law method of making calls; so that an action to recover a call could not be sustained where the complaint did not state that the call was made by giving such notice thereof as the by-laws of the corporation prescribed. A petition omitting this allegation did not state a cause of action.³³

§ 8674. Notice Calling for a Certain Sum Per Share Sufficient.—

Under a statute describing the assessment as being "levied upon the capital stock of the corporation,"³⁴ a notice is sufficient where it states the assessment as a stated sum per share of the capital stock. The fact that the notice describes the assessment as having been levied on the capital stock, instead of on the *subscribed* capital stock, does not render the notice defective, since it follows the statute.³⁵

§ 8675. Notice How Served in Case of a Deceased Shareholder.—

In a case in the English Court of Appeal, Lord Justice Davey said: "I am prepared * * * to hold a deceased member or his estate remains a member for the purpose of the articles, so long as his name remains on the register without notice to the company of his death."³⁶ The love of life is so great in the human breast that a good many people will be glad to know that, for some purposes at least, the law can keep them alive after they are dead. It does not appear, however, that this love of life has induced any one to purchase shares in a joint stock corporation that would not otherwise have done so. What the English court really held is that where the governing statute or instrument provides no mode for giving notice of an assessment where the shareholder is deceased, and the fact has not been made known to the company, a notice sent by mail to him at his registered address, will be sufficient to bind his executors.³⁷

§ 8676. Notice Should be Given by the Secretary.— Where the call is made in due form by the directors, the *secretary* is the

³³ *Germania Iron Min. Co. v. King*, Beecher, 101 Cal. 70; s. c. 35 Pac. 94 Wis. 439; s. c. 36 L. R. A. 51; 69 N. W. Rep. 181.

³⁴ Cal. Civ. Code, § 335.

³⁵ *San Joaquin Land &c. Co. v.*

³⁶ *New Zealand Gold &c. Co. v. Peacock*, C. A. (1894) 1 Q. B. 622, 633.

³⁷ *New Zealand Gold &c. Co. v. Peacock*, (C. A.) (1894) 1 Q. B. 622, 633.

proper officer of the company to give the notice of it to the shareholders.³⁸

§ 8677. **Validity of By-Law Providing for Sales of Shares to Enforce Assessments.**—A by-law empowering the board of directors to declare any stock forfeited for failure of any stockholder to pay an assessment within two months after it is called for by the board, and to sell such stock on account of the delinquent after thirty days' notice, and first to apply the proceeds to the payment of any balance due on the stock, without releasing the delinquent from his original subscription, is authorized by a statute empowering corporations to provide by their by-laws the "mode of selling shares for non-payment of assessments," and is reasonable.³⁹

§ 8678. **Notice of Sale of Shares to Enforce Assessment.**—The manner of giving notice for the sale of shares for delinquent assessment is generally prescribed by statute or by-law,⁴⁰ and this must be followed;⁴¹ and where the statute or by-law is silent, the notice must obviously be *reasonable* according to the circumstances of each particular case.

§ 8679. **Statutes and By-Laws Giving the Right to Forfeit Shares for Non-Payment of Assessments do not Exclude Common-Law Action.**—Statutes⁴² and by-laws⁴³ giving a corporation the right to forfeit or sell the shares or expel its members for non-payment of

³⁸ American Pastoral Co. v. Gurney, 61 Fed. Rep. 41.

³⁹ Elizabeth City Cotton Mills v. Dunstan, 121 N. C. 12; s. c. 27 S. E. Rep. 1001; 61 Am. St. Rep. 654. That a shareholder will not be relieved against a forfeiture of his shares for failing to pay dues thereon as required by the laws, merely because a demand by him for an examination of the books, accounts, and securities of the corporation, made long after his failure to pay dues, was denied,—see Buker v. Leighton Lea Asso., 18 App. Div. (N. Y.) 548; s. c. 46 N. Y. Supp. 35 (two of the five judges dissenting).

⁴⁰ That the advertisement need not be published in the same newspaper as the notice of the assessment under Cal. Civ. Code, § 337,—see Stockton

Combined H. &c. Works v. Houser, 109 Cal. 1; s. c. 41 Pac. Rep. 809.

⁴¹ San Bernardino Invest. Co. v. Merrill, 108 Cal. 490; s. c. 41 Pac. Rep. 487.

⁴² Denver Chamber of C. &c. v. Green, 8 Colo. App. 420; s. c. 47 Pac. Rep. 140; Atlantic Dynamite Co. v. Andrews, 97 Mich. 466; s. c. 56 N. W. Rep. 858; Puget Sound &c. R. Co. v. Onellette, 7 Wash. 265; s. c. 34 Pac. Rep. 929; San Gabriel Valley Land &c. Co. v. Dennis, (Cal.) 34 Pac. Rep. 441; San Joaquin Land &c. Co. v. Beecher, 101 Cal. 70; s. c. 35 Pac. Rep. 349.

⁴³ Catawba Mills v. Hood, 42 S. C. 203; s. c. 20 S. E. Rep. 91; Denver Chamber of C. &c. v. Green, 8 Colo. App. 420; s. c. 47 Pac. Rep. 140.

assessments thereon, are generally construed as giving a *cumulative remedy*, and not as excluding the ordinary remedy by a common-law action for the assessments. The reason is obvious. A bare forfeiture of shares, without subjecting the member to any further liability, amounts merely to a rescission of his contract of subscription. If the remedy by forfeiting the shares were the only remedy of the corporation, or of its creditors whose rights are derived through it, as soon as a corporation should begin to fail, every member would be perfectly willing to have his shares — now no longer a benefit but a liability — forfeited, relieving him of his liability to make good his contract of subscription for the benefit of the creditors of the corporation, and leaving them in the lurch. The general rule, therefore, is that the corporation may *waive* the remedy by forfeiture and sale of the shares, and proceed against the shareholder by action;⁴⁴ and a resolution of the directors instructing the president and secretary to commence such an action is sufficient evidence of such a waiver.⁴⁵

§ 8680. Whether an Actual Forfeiture Bars Further Right of Action.—Where, under the governing statute, the shares are declared to be forfeited, by a resolution of the board of directors, for the non-payment of an assessment laid thereon, this, in strict logic, puts an end to the relation of corporation and shareholder, and thereafter the corporation cannot maintain an action against the shareholder for that or any future assessment. This doctrine is that the corporation may exercise an option to forfeit the shares of the member or sue for the assessment, but it cannot do both: if it forfeits the shares, it cannot maintain the action.⁴⁶ It cannot escape attention that this doctrine furnishes a very convenient way, and one which is often resorted to, for shareholders to rescind their contracts of subscription and escape liability to creditors of the corporation,—that is, to their own creditors. When they see squalls approaching, it is only necessary for them, being in control of the board of directors, to lay an assessment on the shares of the members or on the whole unpaid balance, and then refuse to pay it, and to have the shares forfeited for its non-payment. Such

⁴⁴ San Joaquin Land &c. Co. v. Beecher, 101 Cal. 70; s. c. 35 Pac. Rep. 349. ⁴⁶ Mandel v. Swan Land &c. Co., 154 Ill. 177; s. c. 27 L. R. A. 313; 40 N. E. Rep. 462; rev'g s. c. 51 Ill. App. 204.

⁴⁵ San Gabriel Valley Land &c. Co. v. Dennis, (Cal.) 34 Pac. Rep. 441.

consequences should be, and in some instances have been, provided against by legislation. It is gratifying to know that a doctrine so favorable to the schemes of rascals and so destructive of the rights of honest creditors, has not been universally accepted by the courts.⁴⁷ At all events, where the governing statute or by-law does not provide for an *ipso facto* forfeiture by a mere declaration on the part of the directors, but for a sale of the shares at public auction after advertisement,—then the doctrine that the shareholder is not liable for an unpaid balance ought not to be allowed to prevail, but the case ought to be assimilated to the sale of property under a mortgage deed of trust, which leaves the mortgagor liable for any balance left unpaid by the sale.⁴⁸

§ 8681. **Action for Calls Brought in Name of Corporation.**— The action to collect an assessment laid by the directors is always brought in the name of the corporation, unless the right of action has passed to an assignee, trustee, receiver, liquidator, or other representative of the corporation in case of insolvency or winding up. A corporation, after being duly organized, may maintain an action in its own name to collect a subscription to its capital stock, under a contract executed prior to its incorporation, binding each subscriber to take a certain number of shares and pay a specified per cent. of his subscription on demand, and the “balance as the directors may direct.”⁴⁹

§ 8682. **Unavailing Defenses to Actions for Calls.**— Under various conditions the following defenses have been held unavailing to stockholders against actions for calls: — That he subscribed with the understanding that the capital stock was to be double the amount of its actual capital stock, where, although the resolution had been passed that the capital should be doubled, it was made

⁴⁷ The reasoning of the Supreme Court of Minnesota in *Minnehaha Driving Park Asso. v. Legg*, '50 Minn. 333; s. c. 52 N. W. Rep. 898, certainly works against the conclusion.

⁴⁸ That this is the correct rule where the shares are not subject to a strict forfeiture by a resolution of the directors by which the shares are merely taken back to the corporation, but where they are seized and sold to enforce the payment of the assessment, is shown by the very satisfac-

tory opinion of Nicholls, C. J., in *Succession of Thomson*, 46 La. An. 1074; s. c. 15 South. Rep. 379. It has been held that a statute authorizing recovery after forfeiture of corporate stock, of all calls owing upon it at the time of the forfeiture, does not authorize recovery of interest and expenses thereafter accruing: *Mandel v. Swan Land &c. Co.*, 27 L. R. A. 313; s. c. 154 Ill. 177; 40 N. E. Rep. 462.

⁴⁹ *Branch v. Augusta Glass Works*, 95 Ga. 573; s. c. 23 S. E. Rep. 128.

subject to ratification, and was not in fact afterwards ratified, and no condition was attached to such stockholder's subscription, and no false or misleading information was given him;⁵⁰ that he was not a stockholder at the time when the corporation incurred the obligation or liability to discharge which the assessment was ordered;⁵¹ that the corporation has sufficient property wherewith to meet its obligations;⁵² that the capital stock was subscribed for, in part, by other corporations, and that such subscriptions were invalid under the law of the State where the corporation was organized;⁵³ that the directors had no power to levy the assessment, because they were not elected by ballot as required by law, since they were nevertheless *de facto* officers and their acts as such were valid;⁵⁴ that the organization of the corporation was invalid, the same having a colorable or *de facto* organization;⁵⁵ that the president of the corporation agreed to release the defendant from his contract of subscription, no consideration for the promise and no corporate affirmation of it being shown.⁵⁶

⁵⁰ Glenn v. Hunt, 120 Mo. 330; s. c. 25 S. W. Rep. 181.

⁵¹ Visalia &c. R. Co. v. Hyde, 110 Cal. 632; s. c. 43 Pac. Rep. 10.

⁵² Visalia &c. R. Co. v. Hyde, 110 Cal. 632; s. c. 43 Pac. Rep. 10.

⁵³ United States Vinegar Co. v. Foehrenbach, 148 N. Y. 58; s. c. 42 N. E. Rep. 403; 3 Am. & Eng. Corp. Cas. (N. S.) 164.

⁵⁴ San Joaquin Land &c. Co. v. Beecher, 101 Cal. 70; s. c. 35 Pac. Rep. 349.

⁵⁵ United Growers Co. v. Eisner, 22 App. Div. (N. Y.) 1; s. c. 15 Nat. Corp. Rep. 661; 47 N. Y. Supp. 906.

⁵⁶ United Growers Co. v. Eisner, *supra*.

CHAPTER CCXXXIV.

INCREASE AND REDUCTION OF CAPITAL.

SECTION

8686. No power to increase capital stock unless expressly granted by statute

SECTION

8692. Reduction of capital cannot take place without legislative sanction.

• 8687. No increase valid unless had in compliance with statute.

8693. At what stage of corporate organization reduction may be made.

8688. Rule where the governing statute remits the question to the by-laws.

8694. As among shareholders of the same class, the reduction must be *pro rata*.

8689. Rights in the distribution of new shares upon an increase of capital.

8695. Rights of creditors respecting such reductions.

8690. Subscriptions to an increase of shares.

8696. Judicial approval of resolutions reducing capital stock under English Companies Act.

8691. Subscriber to a void increase of capital not liable.

§ 8686. **No power to Increase Capital Stock Unless Expressly Granted by Statute.**—The doctrine is reaffirmed in many cases that, where the share capital of a corporation has been fixed by its charter or by statute, no power resides, either in the directors or in the corporation at large, to increase it, unless such power has been, in like manner, conferred in express terms by the charter or by statute.¹ Especially the directors of a corporation, who are in general its managing agents merely, who have no power, unless expressly authorized, to do constituent acts,—have no authority to change the number or increase the par value of the shares of its capital stock, as set forth in its charter.²

¹ Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. Rep. 957; Laredo Improv. Co. v. Stevenson, 66 Fed. Rep. 633; s. c. 13 C. C. A. 661; Peck v. Elliott, 79 Fed. Rep. 10; s. c. 47 U. S. App. 605; 38 L. R. A. 616; 24 C. C. A. 425; Granger's Life &c. Co. v. Kamper, 73 Ala. 325; Einstein v. Rochester Gas &c. Co., 146 N. Y. 46.

² Tschumi v. Hills, 6 Kan. App. 549; s. c. 51 Pac. Rep. 619; citing Scovill v. Thayer, 105 U. S. 149; s. c. 26 L. ed. 968; Mechanics' Bank v. N. Y. &c. R. Co., 3 N. Y. 599; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233. Holdings under particular statutes are found to the effect that a corporation organized under the Texas

§ 8687. **No Increase Valid unless had in Compliance with Statute.**—From the foregoing proposition another may be deduced, which is that no increase of the capital stock of a corporation is valid unless the *steps pointed out* by statute for determining upon such an increase have been substantially taken.³

§ 8688. **Rule where the Governing Statute Remits the Question to the By-Laws.**—The doctrine that a corporation cannot increase its capital stock without express statutory authorization has no application where the governing statute remits the whole question to the by-laws. If, in such a case, the capital of the corporation has

statutes has no power to increase its capital stock *to more than double its original amount*: Laredo Improv. Co. v. Stevenson, 66 Fed. Rep. 633; s. c. 13 O. C. A. 661; Kampman v. Tarver, 87 Tex. 491; s. c. 29 S. W. Rep. 768. That the capital stock of a corporation may be increased by vote of its stockholders, under the provisions of Kan. Gen. Stat. 1889, § 1171: Tschumi v. Hills, 6 Kan. App. 549; s. c. 51 Pac. Rep. 619. What is a sufficient compliance with the N. Y. Laws 1848, ch. 40, § 22, requiring a certificate to be made showing "the amount of capital actually paid in": Moosbrugger v. Walsh, 89 Hun (N. Y.) 564; s. c. 35 N. Y. Supp. 550; 70 N. Y. St. Rep. 117. It has been held, in substance, that a transaction by which all the stockholders of a corporation sell their stock to another corporation, receiving for each share sold five shares of the stock of the purchasing corporation, does not effect an increase in the capital stock of the first corporation, where it remains a distinct and existing corporation, with its own officers and board of directors: Einstein v. Rochester Gas & Co., 146 N. Y. 46; s. c. 10 Nat. Corp. Rep. 521; 40 N. E. Rep. 631. In section 2106 of this work it is stated that "in Indiana the right of a corporation to increase or decrease stock is vested in the board of directors and requires a two-third vote of same" (citing Rev. Stat. Ind., Myers & Co. An. ed. 1888, vol. 2, ch. 19, § 3021e). The writer is now informed by J. C. Moore, Esq., a member of the Bar of Indianapolis, that this section is the fifth section of a special act, and that,

by the terms of the first section of that act, it applies only to corporations in existence before the adoption of the present Constitution of Indiana. Our learned informant also says: "The provision for increasing the capital stock of Manufacturing and Mining Companies under which nearly all business corporations are incorporated is found in section 3857 of the Revised Statutes of 1888 (Myers & Co.). This section provides that the capital stock may be increased by a vote of the stockholders at any *annual* meeting. This section is construed by the bar of this State in such a way that the capital stock of such corporations can be increased only at the annual meeting of the stockholders, which is a very different rule than one might obtain from the above quotation from your work."

³ Lincoln v. New Orleans Exp. Co., 45 La. An. 729; s. c. 12 South. Rep. 937; Re Tally-on-Top Salesbook Co., 4 Pa. Dist. Rep. 779; s. c. 17 Pa. Co. Ct. 199; 2 Lack. L. News 40 (holding that the meeting of stockholders to vote upon the proposition required by statute cannot be waived even by unanimous consent); Railroad v. Sneed, 99 Tenn. 1, 10; s. c. 41 S. W. Rep. 364; 7 Am. & Eng. Corp. Cas. (N. S.) 422 (holding that an increase by a mere resolution of the directors without pursuing the steps pointed out by the statute law, was void). See also Schierenberg v. Stephens, 32 Mo. App. 314; Nichols v. Stephens, 32 Mo. App. 330; Winters v. Armstrong, 37 Fed. Rep. 508; Shepp v. Norristown Pass. R. Co., 2 Pa. Dist. Rep. 679.

been fixed by a by-law, it may be increased by amending the by-law. The reasoning in support of this conclusion is that the governing statute makes the fixing of the amount of capital stock a matter of internal regulation, and consequently the mere fact that it has been fixed at one time at a given amount does not exhaust the power to change that amount. It is also well reasoned that a resolution of the stockholders for an increase of the capital stock of the corporation is a sufficient by-law for that purpose to satisfy such a statute.⁴

§ 8689. **Rights in the Distribution of New Shares Issued upon an Increase of Capital.**— Upon the increase of the share capital of a corporation and a consequent issue of new shares, each of the existing shareholders is *prima facie* entitled to become a purchaser of the new shares in the proportion of his holdings of the original shares. This is the rule where the statute which authorizes the increase contains no express provision as to the disposition of the new shares.⁵ This rule of distribution has been applied upon the formation of a new railroad corporation by the union of two other corporations.⁶ But this rule does not apply where the stock is issued for the purchase of property which will become a part of the common property of the corporation.⁷ Under the provision of the English Companies Act, 1872,⁸ that, on the increase of the capital of a company, the new shares shall be offered to the “members” in proportion to their existing shares, the personal representative of a member dying after the creation of new shares, but before they are actually offered to the members, whose name remains on the register is entitled to an allotment of the shares which the decedent would, if living, have been entitled to, where they have not yet been disposed of by the company.⁹

⁴ Peck v. Elliott, 79 Fed. Rep. 10; s. c. 24 C. C. A. 425; 47 U. S. App. 605; 38 L. R. A. 616. This decision seems to overrule Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 Fed. Rep. 957, which holds that a corporation organized under the general law of Tennessee has power, by by-law only, to fix the original or initiatory capital stock of the company, and not to increase or diminish such stock when once fixed by subsequent by-law.

⁵ Jones v. Concord & C. R. Co., (N. H.) 30 Atl. Rep. 614.

⁴ Jones v. Concord & C. R. Co., 67 N. H. 119; s. c. 38 Atl. Rep. 120; 7 Am. & Eng. Corp. Cas. (N. S.) 396.

⁷ Meredith v. New Jersey Zinc & C. Co., 55 N. J. Eq. 211; s. c. 37 Atl. Rep. 539.

⁸ Table A, Art. 27.

⁹ James v. Buena Ventura Nitrate Grounds Syndicate, (C. A.) (1896) 1 Ch. 456; s. c. 65 L. J. Ch. (N. S.) 284; 74 Law T. Rep. 1. Circumstances of necessity under which the directors, having vainly endeavored to dispose of such shares, and having vainly offered them to the existing shareholders at

§ 8690. **Subscriptions to an Increase of Shares.**—An increase of the capital stock of a corporation cannot be made by the directors, but is a constituent act which requires the assent of the shareholders, or a given proportion of them, expressed in the manner pointed out by the governing statute. If the shareholders have authorized an increase by a given amount, and only half the sum is subscribed, the directors cannot treat that as a compliance with the vote of the shareholders and enforce the subscriptions as binding contracts; but, in the absence of circumstances of estoppel, the subscribers may recover back the money which they have paid the corporation thereon. Nor can such a subscription be cured, in the absence of the assent of the subscriber or of circumstances of estoppel, by a subsequent vote of the stockholders to reduce the increase of shares to a smaller amount. Having subscribed for shares in a larger scheme, they cannot thus change his contract into a subscription for shares in a smaller scheme, without his consent.¹⁰

§ 8691. **Subscriber to a Void Increase of Capital not Liable.**—The Supreme Court of Texas have held that, where the legislature has placed a limit upon the extent to which a corporation may increase its capital stock, an attempted increase of its capital beyond that limit is void in the sense of being against public policy; that the shares so issued are illegal and void, even as against creditors, after the corporation has become insolvent and passed into the hands of a receiver; and that a holder of such shares cannot be assessed for the benefit of creditors of the corporation, although there are circumstances of estoppel against him. The court proceeded upon the distinction between an absolute want of power in a corporation to increase its capital, and an irregular exercise of that power.¹¹

less than par, may rightfully allot them to themselves at less than par: *Peter v. Union Man. Co.*, 56 Ohio St. 181; s. c. 37 Ohio L. J. 300; 46 N. E. Rep. 894. State of facts under which a person to whom such shares have been allotted illegally or without authority could not maintain a bill in equity to compel the corporation to issue certificates to him: *Smith v. Franklin Parker &c. Co.*, 168 Mass. 345; s. c. 47 N. E. Rep. 409.

¹⁰ *Matthews v. Columbia Nat. Bank*, 79 Fed. Rep. 558.

¹¹ *Kampman v. Tarver*, 87 Tex. 491; s. c. 29 S. W. Rep. 768. The writer doubts the soundness of this decision. The Supreme Court of Texas is composed of three judges only, and this decision was by two judges only, Mr. Justice Denman, a strong and clear-headed judge, not sitting.

§ 8692. **Reduction of Capital Cannot Take Place without Legislative Sanction.**—Like the increase of the capital stock of a corporation,¹² its reduction cannot take place without express legislative sanction. Indeed, the law is, or should be, more solicitous about a reduction than about an increase of the capital stock of the corporation; since an increase of the share capital, where the new shares are sold, has the effect of augmenting the assets of the corporation and enhancing the security of creditors; and even where the new shares can be distributed among the existing shareholders without being sold to them, the result is merely to increase the number or change the dimensions of the documents which represent their respective holdings in the corporation, without affecting its tangible assets, or diminishing the security of creditors, unless by the temptation to declare larger dividends. So, a reduction of the share capital by calling in a portion of the shares where they have sunk to less than their par value, does not diminish the assets which are available to creditors. But this is not so where the reduction takes the form of the corporation buying in its own shares, and distributing its assets in exchange. Such arrangements are distinctly prejudicial to creditors; the possibility of them endangers the rights of the public; they are hence forbidden in many of the American States by the constitutional or statutory law, and are treated as voidable at the suit of creditors by all courts which have been able to take sound and honest views of the question.¹³

§ 8693. **At what Stage of Corporate Organization Reduction may be Made.**—In Illinois a corporation which has passed every stage of its organization except the recording of the certificate that such organization is complete, may reduce its capital stock before filing such certificate.¹⁴

¹² *Ante*, § 8666.

¹³ Examine on this question, *British &c. Corp. v. Couper*, A. C. (1894) H. L. (E.) 399; *Re Denver Hotel Co.*, (1893) 1 Ch. 495. As to the want of power in a corporation to purchase its own shares, see *ante*, § 8351. That the purchase of shares of its own stock, by a corporation having authority to do so, does not operate as a reduction of the capital stock, where it did not reserve to itself the power to reduce its capital stock,—was held in *West-*

ern Improv. Co. v. Des Moines Nat. Bank, 103 Iowa, 455; s. c. 72 N. W. Rep. 657.

¹⁴ *Gade v. Forest Glen Brick &c. Co.*, 165 Ill. 367; s. c. 13 Nat. Corp. Rep. 291; 46 N. E. Rep. 286; affg. s. c. *sub nom.* *Forest Glen Brick &c. Co. v. Gade*, 55 Ill. App. 181. Evidence of notice of the meeting to reduce capital — failure of some of the stockholders to recollect that they had such notice: *Gade v. Forest Glen Brick &c. Co.*, *supra*.

§ 8694. **As Among Shareholders of the Same Class, the Reduction must be Pro Rata.**—The general rule undoubtedly is that, as among the holders of the same class of shares, any reduction of the share capital must be *pro rata*; otherwise the relative rights of the shareholders in the corporation would be disturbed.¹⁵ Exceptions to this rule have been admitted in some cases under the English Companies Acts where such reductions must receive the sanction of the court. For example, a court may, under this act,¹⁶ sanction a special resolution for the reduction of capital no longer represented by available assets, by canceling the whole of two out of three classes of shares. In so holding, Mr. Justice Chitty proceeded upon the view that, where there has been a loss of capital, and where there are first preference, second preference and ordinary shares, the loss should be made to fall upon that class of shares which, according to the constitution of the company, is the proper class to bear it; and in the particular case he threw the loss upon the second preference and ordinary shareholders.¹⁷ The British Companies Acts, 1867 and 1877, conferred the power, construed as mere power, in a court to sanction a reduction of capital where shares of the same class are not called in *pro rata*. While it was admitted in the House of Lords that the power to sanction a resolution of shareholders making a reduction otherwise than *pro rata* with respect to each class of shares, ought not to be exercised except under peculiar circumstances, such reduction was, nevertheless, sanctioned where there were no creditors and but one dissenting shareholder. The arrangement, in substance, was, that a limited share company, having power, under its articles, to reduce its capital by paying off capital, made such a reduction by withdrawing that part of its business which it was carrying on in the United States, and turning its American investments over to its American shareholders, and by the English shareholders taking the English assets and receiving an agreed sum by way of adjustment. Their Lordships (reversing the Court of Appeal) sanctioned this scheme of reduction, finding that it was, under the circumstances, fair and equitable.¹⁸

¹⁵ *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250; *Re Denver Hotel Co.*, (1893) 1 Ch. 495; qualified in *British &c. Corp. v. Couper*, A. C. (1894) H. L. (E.) 399.

¹⁶ Companies Act, 1867, 30-31 Vict. ch. 131, § 9; and 1877, 40-41 Vict. ch. 26, § 3.

¹⁷ *Re Floating Dock*, [1895] 1 Ch. 691; s. c. 64 L. J. Ch. (N. S.) 361.

¹⁸ *British &c. Corp. v. Couper*, (H. L. E.) [1894] A. C. 399.

§ 8695. **Rights of Creditors Respecting Such Reductions.**—With respect to the reduction of the share capital of a corporation, the rights of creditors would seem to be limited to the proposition that, as against them, a corporation cannot distribute any portion of its capital, as distinguished from income, in return for its shares which are called in. Such a transaction, leaving corporate debts unpaid or unprovided for, would be in the nature of a fraudulent conveyance by a debtor of his property. But the mere fact that such a reduction may, in a given case, disturb the rights of the shareholders among themselves can be no concern of creditors. They cannot, for example, complain that the surplus shares were not called in and canceled *pro rata*; and this is especially so with respect to creditors who become such subsequently to the reduction.¹⁹

§ 8696. **Judicial Approval of Resolutions Reducing Capital Stock Under English Companies Act.**—Under the English Companies Act, 1862, a joint stock corporation had no power to reduce its capital stock, and reductions undertaken while this statute was in force were *ultra vires*. This was changed by Parliament in the Acts of 1867 and 1877, by providing that such reductions might take place upon the resolution being affirmed by the court.²⁰ Under these statutes, as just seen, the power exists in a court to which a resolution has been presented, reducing the capital stock of a company limited by shares, to sanction a reduction which is not *pro rata* even among shareholders of the same class, though such resolutions will be scrutinized, and the power will not be exercised except in very plain cases.²¹ As between different classes of shares, the class which should bear the loss of the reduction will depend upon the constitution of the company.²² A scheme of reduction may, in a proper case, be sanctioned, although it changes the voting powers of the shareholders.²³ The court may sanction a resolution reducing the original shares issued and fully paid

¹⁹ Gade v. Forest Glen Brick &c. Co., 165 Ill. 367; s. c. 13 Nat. Corp. Rep. 291; 46 N. E. Rep. 286; aff'g s. c. *sub nom.* Forest Glen Brick &c. Co. v. Gade, 55 Ill. App. 181; s. c. 8 Nat. Corp. Rep. 336.

²⁰ 30–31 Vict. ch. 131, §§ 9, 11; 40–41 Vict. ch. 26, §§ 3, 4.

²¹ British &c. Corp. v. Couper, A.

C. (1894) H. L. (E.) 399; overruling on this point Re Denver Hotel Co., (1893) 1 Ch. 495.

²² Re London &c. Invest. Corp., (1895) 2 Ch. 860; s. c. 64 L. J. Ch. (N. S.) 729; 73 Law T. Rep. 280.

²³ Re James Colmer, (1897) 1 Ch. 524; s. c. 66 L. J. Ch. (N. S.) 326; 76 Law T. Rep. 323.

up, leaving the unissued shares unreduced; but where the articles of association give each shareholder a voting power proportionate to his original holding, the company will be required to alter the articles so as proportionately to reduce such power.²⁴

²⁴Re Pinkney & Sons S. S. Co., (1892) 3 Ch. 125. Schemes for the reduction of the capital of share companies were approved by the court in the following cases: Re Omnium Invest. Co. [1895] 2 Ch. 127; Re National Dwellings Soc., (Ch.) 78 Law T. Rep. 144; Re Nixon's Navigation Co., (1897) 1 Ch. 872; s. c. 66 L. J. Ch. (N. S.) 406. That a court has no power, in confirming such a scheme, to dispense with settling a list of creditors, as required by the statute,—see Re Lamson Store Service Co., (1895) 2 Ch. 726, s. c. 64 L. J. Ch. (N. S.) 777; 73 Law T. Rep. 311. What is not a reduction of capital within the above statutes,—see Thomson v. Trustees E. & c. Ins. Corp., [1895] 2 Ch. 454.

TITLE TWENTY-SIX.

THE LAW OF BUILDING AND LOAN
ASSOCIATIONS.

TITLE TWENTY-SIX.

THE LAW OF BUILDING AND LOAN ASSOCIATIONS.*

CHAPTER

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CHAPTER CCXXXV.

DEFINITIONS AND KINDS.

- | SECTION | SECTION |
|--|---|
| 8700. Definition and nature of a building association. | 8703. Serial building and loan societies. |
| 8701. Terminating building and loan societies. | 8704. Terminology of building and loan societies. |
| 8702. Permanent building and loan societies. | |

* By Hon. G. A. Endlich. See Preface to this Volume.

§ 8700. Definition and Nature of a Building Association.—

A building association¹ is a private corporation for gain² erected for such time, limited or unlimited, as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders in payment of the stock subscribed by them, the penalties for their non-payment and the profits of their investment, of a fund to be applied, from time to time, in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring free possession of real estate or constructing dwellings, or both,³ under terms and regulations prescribed by legislation, or reasonably and lawfully ordained by the charter and by-laws of the corporation, upon principles of strict mutuality and equality of benefits and obligations,⁴ with the effect of extinguishing the liability incurred for such loans or advancements simultaneously with the termination of the shareholder's periodical contributions upon the stock held by him in the association;⁵ the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him and held without loans, and to extinguish all loans owing by shareholders.⁶

¹ These associations are variously known as Building Associations, Building and Savings Associations, Building and Loan Associations, Mutual Benefit Building Societies, Loan Fund, or Loan and Fund, Associations, Homestead Associations, Mutual Loan, Savings and Building Associations, Co-operative Savings, or Saving and Loan, Associations, etc.

² *State v. McGrath*, 95 Mo. 193.

³ This element has repeatedly held to form an essential feature in the legitimate building association scheme: See *Kupfert v. Guttenberg B. A.*, 30 Pa. St. 465; *Jarrett v. Cope*, 60 id. 67; *Albright v. Lafayette B. & S. Asso.*, 102 id. 411; *Gordon v. Winchester B. & A. F. Asso.*, 12 Bush (Ky.) 110; *People v. Preston*, 140 N. Y. 549; 35 N. E. Rep. 979; *Seibel v. Victoria Building Association*, 43 Ohio St. 371; *Mandlin v. Amer. S. & L. Asso.*, 63 Minn. 358; 65 N. W. Rep. 645; *Kent Benefit B. Soc'y*, 1 Dr. & Sm. 417, per *Kindersley*, V. C. It is not within a constitutional provision relating to corporations "with banking or discounting privileges:" *Scho-*

ber v. S. F. & L. Asso., 35 Pa. St. 223; *Cooper v. S. & L. Asso.*, 100 id. 402; *Baker v. People's &c. Asso.* 42 Ohio St. 655. And the use of "National" in its name does not offend against the U. S. statute prohibiting its use by banking companies: *Lomb v. Pioneer S. L. Co.*, 106 Ala. 591, 671; 17 South. Rep. 670.

⁴ *Latimer v. Equitable L. & I. Co.*, 81 Fed. Rep. 776; *Baltimore B. & L. Asso. v. Powhattan Impr. Co.*, (Md.) 39 Atl. Rep. 274.

⁵ *Endl.*, B. A. (2d ed.), § 16. See also definition in *Cook v. Equitable B. & L. Asso.* (Ga.) 30 S. E. Rep. 911. The mere grant in the charter of power to go into other kinds of business is there said not to destroy the character of a corporation as a building association, when there has been no attempt to exercise such powers. But compare *Meroney v. Atlanta Nat. B. & L. Asso.*, 116 N. C. 922; 21 S. E. Rep. 924.

⁶ The stock is taxable: *State v. Creveling*, 39 N. J. L. 465; *aff'd*, 40 id. 192; *Bourgignon B. Asso. v. Comm.*, 98 Pa. St. 54; *State v. McGrath*, 95

§ 8701. **Terminating Building and Loan Societies.**—*Terminating* societies, strictly so called, are those in which the membership and the association terminate at the same time.⁷ All the stock is treated as if issued at the beginning of the association, to run throughout the entire period, limited by statute or charter provision to a certain number of years or until the stock shall be worth its par value. As, in point of fact, all the shares are not at once taken, those subscribed for after the inception of operations are subject to payments of arrearages sufficient to equalize them, in the amount paid thereon, with those first issued.⁸ These payments are called *back-payments*.⁹

§ 8702. **Permanent Building and Loan Societies.**— *Permanent* societies, strictly so called, are those which have perpetual charters, the amount of their capital stock being fixed at a certain sum which may be increased from time to time.¹⁰ The radical difference between this class of societies and the terminating kind lies in this, that, whereas in the latter a person must either become a member at the time the society is established, or else pay an amount of back subscriptions proportionate to the time which has elapsed since that date, he may, in this class, become a member at any time without making back-payments. Shares are issued as they are subscribed for, upon which the subscribers make payments, either in one sum (when the share so paid for is said to be *paid up*) or by periodical sums equal to those paid by the original members, with whom the new ones enter upon an equality, their stock dating, or running, from the time of their entry. As the shares first issued mature, in the order of their seniority, they are canceled, and either paid out to the holder or set off against his indebtedness; or, if he is not indebted and does not wish to draw out, a certificate of *paid up* stock is issued to him, and he leaves his money in the association as an investment.¹¹

Mo. 193; McGowan v. Savannah Mut. L. Asso. 80 Ga. 515; 5 S. E. Rep. 775. See as to taxation of non-borrowing members' stockholdings in Indiana, Harn v. Woodard, (Ind.) 50 N. E. Rep. 33.

⁷ Endl., B. A., § 26.

⁸ Setliff v. North Nashville B. & L. Asso. (Tenn.) 39 S. W. Rep. 546; Rosenthal, Man. for B. A., § 11.

⁹ Endl., B. A., § 41; after making which the new member stands upon the footing of an original one: Home

Mut. B. Asso. v. Thursby, 58 Md. 284. The Bowkett and Starr-Bowkett societies are varieties of terminating societies hardly if at all, known in America, for description of which see Endl., B. A., §§ 21-23; Davis, Build. & Land Soc., pp. 65-69.

¹⁰ Rosenthal, B. A., § 12; Davis, B. & L. Soc., pp. 69-70; Endl., B. A., § 23.

¹¹ Rosenth., B. A., *ubi supra*. As to Ohio or Dayton plan, see Endl., B. A., § 23, note.

§ 8703. **Serial Building and Loan Societies.**— *Serial* societies partake of the characteristics of both terminating and permanent societies.¹² The corporate duration of a serial society may be either limited or perpetual. The distinctive feature is that the stock is issued in series, a new series being started yearly, monthly, weekly, etc., and each series, while participating with all the others then running in the profits and losses of the common enterprise,¹³ being nevertheless treated, to some extent, as a separate association.¹⁴ The payments upon the stock issued in the successive series begin with the starting of the series, and cease when the shares comprised in it mature.¹⁵

§ 8704. **Terminology of Building and Loan Societies.**— Whilst, in other stock companies, the capital stock is but the means of effecting the objects of the incorporation, and its payment, at least in part, a prerequisite to their operation, the *capital* or *stock* of a building association is the fund which the association aims at accumulating, and the accumulation of which marks the period of the existence of a terminating, of a series in a serial, and of the membership of the subscriber in a permanent association. It is divided into *shares*, to which is given, by law or charter, a fixed *par* or *paid-up* value, representing the amount which these shares are expected to be worth when the society, series or stock-subscription, shall have run its course. The value of these shares is made up, principally, by periodical payments made thereon by the holders, and variously termed *stock payments*, *installments*, *subscriptions*, or *dues*, and the profit derived from the investment thereof and the reinvestment of the interest accruing. Corresponding with the par value of the share is the *loan*, or *advancement*. A member being entitled to a loan for every share of stock he holds, the money which the association is prepared to put out is divided into lots, each equal to the par value of a share. These lots are called loans, or advancements, and are *bid* for separately, the highest bidder getting the loan, but the member generally having the right to take as many loans as his stock interests entitle him to at the figure

¹² Endl., B. A., §§ 24-26; Rosenth., B. A., § 12; Davis, B. & L. Soc., pp. 70-72.

¹³ In proportion to the amount paid on each share: Tyrrell L. & B. Asso. v. Haley, 163 Pa. St. 301.

¹⁴ Mercer v. Amber B. & L. Asso., 10 Pa. C. C. Rep. 51; Rodgers v. Mut. S. F. & B. Asso., 7 W. N. (Pa.) 95; Deering v. Bishop Bailey B. & L. Asso., (N. J.) 24 Atl. Rep. 575.

¹⁵ Endl., B. A., § 24.

bid for the first. The amount bid as the price of his preference is the *premium*. Every share upon the strength of being the holder of which its owner obtains a loan, is said to be *redeemed* or *advanced* as to the association, *bought out* as to the member. The latter is known as a *borrower*, a *borrowing* or *advanced* member, as distinguished from the *non-borrowing, unadvanced, or investing* members, or *investors*.¹⁶ As soon as the shares of a society or series have reached their par value, the society or series is ready for the *winding up*, i. e., in the case of a terminating society, the closing of its business and the dissolution of its corporate existence; in that of a series, a settlement of accounts between the association and the holders, borrowing and investing, of shares in the matured series. Before, however, that period arrives, a member may, ordinarily, sever his connection with the association by *withdrawal*, surrendering to it his membership and certificate, and receiving from it the then *withdrawal value* of his stock, i. e., the amount of stock payments already made by him, with such a proportion of profits as may be fixed by statute, charter or by-law, and less such ratable share of the losses and expenses as may be similarly ascertained and required. But, in order to exercise the right of withdrawal and to claim its privileges, the *withdrawal notice*, setting forth the intention of the party, must have been duly given to the society.¹⁷

¹⁶ Under the Michigan statute, the transaction of loan is called a "sale," and the investors "non-selling" members. the borrowers being termed "selling" bers.

¹⁷ See Endl., B. A., §§ 12-14.

CHAPTER CXXXVI.

INCORPORATION AND MEMBERSHIP.

SECTION	SECTION
8706. Incorporation of building and loan associations.	8710. Whether corporations can be members of building and loan associations.
8707. Collateral inquiry into their corporate existence.	8711. Membership for the mere purpose of obtaining a loan.
8708. Membership in building and loan associations: Infants — married women.	8712. Evidence of membership: Estoppel to deny membership.
8709. Status of executors and administrators of deceased members.	8713. Termination of membership.
	8714. Distinction between depositors and members.

§ 8706. Incorporation of Building and Loan Associations.—

The act of incorporation of a building association, like that of other corporations for profit,¹ may be consummated (1) by the executive of the State issuing his patent, by virtue of powers vested in him by statute, upon application to him properly made under the same; (2) by special legislative enactment;² (3) by decree of court, or other judicial authority, proceeding in accordance with, and under, general laws;³ (4) by the operation of law, endowing, by virtue of statutes passed for that purpose, with the character and capacities of a body corporate, persons desirous of acquiring the same, who have

¹ A building association is a corporation for profit, and the mere declaration of the legislature that it is a benevolent institution will not make it so: *State v. McGrath*, 95 Mo. 193.

² It has been held competent for the legislature to incorporate a building association already in existence and doing business as a voluntary association under a constitution and set of by-laws, by reference to the same and without setting them forth in the enactment: *Bibb Co. Loan Asso. v. Richards*, 21 Ga. 592. Of course, the power to incorporate by special act can be exercised only where there is no constitutional prohibition in the way of such legislation.

³ Where the petition for incorporation fails to set forth the objects of the proposed corporation, the court, in granting its assent, may specify them and prescribe the terms on which the charter is granted: *Redwine v. Gate City L. & B. Asso.*, 54 Ga. 474. A building association with the usual powers may be incorporated under a general incorporation law, though it makes no reference to such associations: *Goodman v. Durrant B. & L. Asso.*, (Miss.) 14 So. Rep. 146. As to latitude allowable, see *People v. Preston*, (N. Y.) 35 N. E. Rep. 979; *infra*, § 8758.

authenticated and legitimated their act of association in accordance with the statutory requirements.⁴

§ 8707. Collateral Inquiry into their Corporate Existence.—

A *prima facie* title to corporate existence being shown, based upon a *de facto* acquisition of the franchise, from a proper source, apparently legal, neither fraud⁵ or irregularities⁶ in the proceedings to obtain the incorporation, nor defective organization,⁷ nor any illegal features of the charter or by-laws,⁸ nor such subsequent acts of the society or its officers as would work a forfeiture of its franchises at the suit of the State⁹ can be invoked to impeach its corporate capacity by way of defense, collaterally, against its demands. No private person can be permitted to deny, on any such ground, that it is a corporation *de jure*.¹⁰ And this rule applies with increased force to those who have dealt with the association as a corporation, and thereby recognized its capacity as such.¹¹ And this

⁴ The charter must conform to the Constitution of the State: *State v. McGrath*, 95 Mo. 193. As to amendments of charter, see *Krakowski v. North. N. Y. B. & L. Asso.*, 27 N. Y. Supp. 314.

⁵ Such as mistating the amount of the capital stock subscribed: *Pattison v. Albany B. & L. Asso.*, 63 Ga. 373.

⁶ E. g., failure of the whole number of corporators required by the statute to sign the application: *Workingmen's B. Asso. v. Coleman*, 89 Pa. St. 428; and see *Rhoads v. Hoernerstown B. Asso.*, 82 id. 180; or the articles of association to be filed and recorded: *Second Manhattan B. Asso. v. Hayes*, 4 Abb. App. Dec. (N. Y.) 183; *West Winsted Sav. Bank & B. Asso. v. Ford*, 27 Conn. 282; *Same v. Rice*, id. 293; and see *People's Sav. Bank & B. Asso.*, ib. 145; or the omission, in the petition or certificate to fill out the blank intended for the insertion of the day of the month given as that on which the association was effected: *Second Manhattan B. Asso. v. Hayes*, *supra*; or the insufficiency of the acknowledgment of the articles of association: See *Spinning v. Home B. & S. Asso.*, 26 Ohio St. 483.

⁷ *Fayette v. Free Home B., L. & H. Asso.*, 27 Ill. App. 307; *Massey v. Cit. B. & S. Asso.*, 22 Kan. 624.

⁸ *Lord & Robinson v. Essex B. Asso.*,

37 Md. 320; *Beckett v. Uniontown B. Asso.*, 88 Pa. St. 211; *Albright v. Lafayette B. & S. Asso.*, 102 id. 411. Such provisions are simply void: See the cases just cited, and *Booz's App.* 109 id. 592; *Laing v. Reed*, L. R. 5 Ch. App. 4.

⁹ *Endl., B. A.*, § 539.

¹⁰ *Mechanics' B. Asso. v. Stevens*, 5 Duer (N. Y.) 676; *Pattison v. Albany B. & L. Asso.*, 63 Ga. 373; *Lincoln B. & S. Asso. v. Graham*, 7 Neb. 173; *Same v. Benjamin*, ib. 181; *McLaughlin v. Citizens' B. Asso.*, 62 Ind. 264; *Lord & Robinson v. Essex B. Asso.*, 37 Md. 320; *Beckett v. Uniontown B. Asso.*, 88 Pa. St. 211; *Workingmen's B. Asso. v. Coleman*, 89 id. 428; *Albright v. Lafayette B. & S. Asso.*, 102 id. 411; *Miller's Est.*, 2 Pears. (Pa.) 248; *Manuf. & Mech. S. & L. Co. v. Conover*, 5 Phila. (Pa.) 18; *West Winsted Sav. Bank & B. Asso. v. Ford*, 27 Conn. 282; *Same v. Rice*, ib. 293; *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428; *Williamson v. Kokomo B. & L. F. Asso.*, 89 Ind. 389; *American Homest. Co. v. Linnigan*, 46 La. An. 1118; 15 So. Rep. 369; *Reg. v. D'Eyncourt*, 9 Law T. Rep. (N. S.) 72; 4 Best & S. (116 Engl. C. L. R.) 820.

¹¹ As one who has given to it, in its corporate name, a note or mortgage: *Franz v. Teutonia B. Asso.*, 24 Md. 259; *West Winsted Sav. Bank &*

prohibition extends to the questioning of corporate powers appropriate and necessary to the transaction of its business.¹² But it does not debar one sued by a building association from demonstrating, from the face of the charter produced by it, that the period for which it was incorporated has expired,¹³ or, as affecting his liability,¹⁴ that its business has been abandoned.¹⁵

§ 8708. **Membership in Building and Loan Association : Infants — Married Women.**— Membership in a building association follows the acquisition of its stock.¹⁶ It may be repudiated where it was in-

B. Asso. v. Ford, 27 Conn. 282; Same v. Rice, ib. 293; Massey v. Cit. B. & S. Asso., 22 Kan. 624; Johnston v. Elizabeth B. & L. Asso., 104 Pa. St. 394; Fayette v. Free Home B., etc., Asso., 27 Ill. App. 307; or one who has purchased property subject to such mortgage: People's Sav. Bank & B. Asso. v. Collins, ib. 145; or members and others who have dealt and contracted with the association as a corporation: Hagerman v. Ohio B. & S. Asso., 25 Ohio St. 186; Lucas v. Greenville B. & S. Asso., 22 id. 339; Spinning v. Home B. & S. Asso., 26 id. 483; Morrison v. Dorsey, 48 Md. 461; Howard Mut. L. & F. Asso. v. McIntire, 3 Allen (Mass.) 571; Livingston L. & B. Asso. v. Drummond, 49 Neb. 200; 68 N. W. Rep. 375; or defendants in a suit by an association, who, in their pleadings, have asserted that the concern is a corporation: Nat. Mut. B. & L. Asso. v. Ashworth, 91 Va. 706; 25 S. E. Rep. 521, or in an affidavit of defense filed, have admitted that the plaintiff is a corporation under the statute under which it assumes to operate and sue: Ganster v. Homestead B. Asso. (Pa.) Endl., B. A., § 545.

¹² People's Sav. Bank & B. Asso. v. Collin, 27 Conn. 145; Amer. Homest. Co. v. Linigan, 46 La. An. 1118; 15 So. Rep. 369; Albright v. Lafayette B. & S. Asso., 102 Pa. St. 411.

¹³ Endl., B. A., § 540. So a defendant may show that the stock of the series to which he belongs has matured: Charles Tyrrell L. & B. Asso. v. Haley, 139 Pa. St. 477; 20 Atl. Rep. 1063.

¹⁴ See *infra*, § 8796.

¹⁵ Endl., B. A., § 540.

¹⁶ *Ib.*, § 45; Build'g Asso. v. Robinson, 46 Leg. Int. (Pa.) 5; 19 Phila. 358; Setliff v. North Nashville B. & S. Asso., (Tenn.) 39 S. W. Rep. 546. This may be at the start of the association or during its subsequent existence; nor is it necessary that a new member should sign the original articles of association: Concordia &c. Asso. v. Read, 93 N. Y. 474; or comply with a requirement of signing a separate paper pledging submission to constitution and by-laws: Build'g Asso. v. Robinson, *supra*. And after enjoying the benefits of membership, one cannot be heard to deny that he signed the by-laws: Parker v. U. S. &c. Asso., 19 W. Va. 744. Though there be a rule that stock shall be transferable only on the books of the association, delivery of a properly executed power of attorney to transfer, in blank, together with the certificate, is sufficient: German Union B. & S. F. Asso. v. Sendmeyer, 50 Pa. St. 67, to convey an equitable title: Bank of Commerce's App., 73 id. 59, to render which absolutely available the assignment must be produced to the association or a formal transfer effected, or at least remanded: *Ibid.* But the association may estop itself from objecting, to the want of such transfer, etc., by receiving dues from the purchaser and treating him as owner of the shares: Dennison v. Alpena L. & B. Asso., (Mich.) 75 N. W. Rep. 300. See also Prairie State L. & B. Asso. v. Gorrie, 167 Ill. 414; 47 N. E. Rep. 739. The association may charge a reasonable fee for recording the transfer: McGannon v.

duced by fraud imputable to the association, e. g., by false representations of its authorized officers concerning the profits of its past and present business.¹⁷ But one who for three years acted as a director of the association and had notice of its business methods and financial condition, cannot thereafter on such grounds rescind his contract of membership.¹⁸ Any individual capable of entering into a binding contract or acquiring property subject to a condition may become a member.¹⁹ In England, the fact of infancy, in many of the States that of coverture, is no bar to valid membership.²⁰

§ 8709. Status of Executors and Administrators of Deceased Members.—An executor or administrator of a deceased member is

Centr. B. Asso., 19 W. Va. 726. For an improper refusal by the association to record the transfer, the owner of the shares has an action for damages, the measure of damages in which will be the actual value of the shares at the time of such refusal: *Germ. Union B. & S. F. Asso. v. Sendmayer, supra*; *North America B. Asso. v. Sutton*, 35 Pa. St. 463; i. e., the amount that has been paid as dues on the stock up to the time of refusal, with interest from the dates of the several payments: *Ibid.* But a mandamus to compel a transfer will not lie: *State v. People's B. & L. Asso.*, 43 N. J. L. 389. Ordinarily, the association has a lien upon a member's stock for all arrearages due thereon, and a by-law prohibiting a transfer of them while subject to such lien is valid: *Endl., B. A.*, § 475.

¹⁷ *Neuman v. N. Y. Mut. S. & L. Asso.*, 44 N. Y. Supp. 896. But such false representations must relate to matters material to the transaction: *Amer. B. & L. Asso. v. Bear*, 48 Neb. 455; 67 N. W. Rep. 500. And see *Bldg. & Loan Asso. v. Cameron*, 48 Neb. 124; 66 N. W. Rep. 1109.

¹⁸ *Amer. B. & L. Asso. v. Rainbolt*, 48 Neb. 434; 67 N. W. Rep. 493: Neither in respect of the stock subscribed for by himself, nor as assignee of claims of other holders represented by him as agent and therefore chargeable with his knowledge.

¹⁹ Unless imposed by statute, charter or by-law, there is no restriction upon the number of shares any member may hold. But where that number is limited by law, any agreement

between the association and a member in respect of a greater number is incapable of enforcement by action: *Simpson v. Greenfield B. & S. Asso.*, 38 Ohio St. 349. Compare *Hagerman v. Asso.*, 25 id. 186; *infra*, § 8756. A small entrance fee, per share, is usually charged, and such fees are said to be properly applicable to the discharge of the ordinary expenses of the association, and not a deposit or payment to be subsequently accounted for: *Barker v. Bigelow*, 15 Gray (Mass.) 130. See also *Crenshaw v. Hedrick*, (Tex.) 47 S. W. Rep. 71.

²⁰ Though building associations are often described as mere incorporated partnerships: See *Silver v. Barnes*, 6 Bing. N. C. 180; *Estate of Nat'l S., L. & B. Asso.*, 9 W. N. (Pa.) 79; *Christian's App.*, 102 Pa. St. 184; *Atwood v. Dumas*, 149 Mass. 167; *Pattison v. Albany B. & S. Asso.*, 63 Ga. 373; *Brown v. Sanders*, 20 D. C. 455; *Mich. B. & S. Asso. v. McDevitt*, (Mich.) 43 N. W. Rep. 373; *King v. Internat. B., L. & I. Co.*, 170 Ill. 135; 48 N. E. Rep. 677; *Endl., B. A.* § 547, this is rather a description of their practical, than their legal attributes: *Building & Loan News*, July, 1890, and it was, therefore, held, in *City B. & L. Asso. v. Jones*, 32 S. C. 308; 10 S. E. Rep. 1097, that a married woman capable of acquiring, by purchase or otherwise, shares in the capital stock of other corporations, may own and hold shares in a building association. But such authority does not, in itself, imply a right in her to become a borrower: *Build. & L. News*, Aug. 1890.

not *ipso facto*, a member of the association,²¹ but entitled to all the advantages the decedent would have had upon voluntary withdrawal or repayment,²² as well as bound to comply with the requirements of the decedent's obligation as to payments, etc., after a reasonable time to be allowed him to acquaint himself with the estate intrusted to him, and to get into his hands funds wherewith to discharge such payments.²³

§ 8710. **Whether Corporations can be Members of Building and Loan Associations.**—Proceeding upon the fundamental considerations which led to the establishment of building associations and their primary purpose,—the scheme to utilize money collected in small sums so as to do most benefit to their own members, and such, in particular, as may desire to possess or build houses,²⁴—it would seem that a building association cannot legitimately become a member or shareholder in another,²⁵ nor permit corporations generally to acquire membership in it. In the present state of the law, however, this question must be regarded as unsettled.²⁶

§ 8711. **Membership for the Mere Purpose of Obtaining a Loan.**—A person may become a member for the mere purpose of obtaining a loan.²⁷

²¹ Endl., B. A., § 51. See *Montgomery Mut. B. & L. Asso. v. Robinson*, 69 Ala. 413, for a charter provision under which the right to membership passed to the heirs or devisees, and not the personal representatives of a deceased member.

²² See *In re Snider's Est.*, 34 Leg. Int. (Pa.) 49.

²³ Endl., B. A., § 53.

²⁴ *Supra*, § 8700; Endl., B. A., § 54.

²⁵ *Ibid.*

²⁶ In *Union B. L. Asso. v. Masonic Hall Asso.*, 29 N. J. Eq. 389, where a corporation had subscribed for stock in a building association and received a loan from it, the transaction was upheld. In *State v. Rohlfes*, (N. J.) 19 Atl. Rep. 1099, the right of an incorporated church holding stock in a building association, to vote the same was unquestioned. In *Durham Co. &c. Soc., Wilson's Case*, L. R. 12 Eq. 576, the decision turned on the limitations upon the rights of the society's trustees under its rules. In

Mechanics' &c. B. Asso. v. Meriden Agency Co., 24 Conn. 159, the right of the latter to subscribe for stock in the former was denied, and the loan treated as not to a member, but to a stranger. In *Kadish v. Garden City &c. Asso.*, 151 Ill. 531; 38 N. E. Rep. 236, it was alleged as a defense in a proceeding to foreclose a mortgage taken by a building association, that the loan was made to a member for the benefit of a corporation; but it was held, that, there being no express prohibition in the way, one who had become interested in the property with full knowledge of the mortgage could not dispute its validity any more than the mortgagor could. Compare *Gordon v. Winchester B. &c. Asso.*, 12 Bush (Ky.) 110; *Mills v. Salisbury B. & L. Asso.*, 75 N. C. 292; *Latham v. Washington B. & L. Asso.*, 77 id. 145; *Martin v. Nashville B. Asso.*, 2 Cold. (Tenn.) 418; *People v. Preston*, 140 N. Y. 549; 35 N. E. Rep. 979.

²⁷ *Ottawa &c. Asso. v. Freeman*, 114

§ 8712. Evidence of Membership: Estoppel to Deny Membership.—In all dealings between the association and its members, not in especial contract relations; in stock payments, exercise of the right of voting, participation in dividends, etc., the stock book is *prima facie* evidence of membership, and the association, in the absence of circumstances calculated to put it upon its guard, is not required to look beyond.²⁸ The society may estop itself from denying a person's membership; e. g., where it continues to receive stock payments from one whose shares it afterwards claims to have forfeited.²⁹ And conversely, a borrower from a building association may be estopped from denying that he is a member of it. Thus, where the signing of the by-laws was, by the charter, made a requirement in order to membership, and the law of the State prohibited building associations from loaning money to any but members, the execution of a bond necessarily implying or purporting to be that of a member by a person receiving a loan from the society without ever having signed the by-laws, was held a sufficient assent to them, and he was not thereafter permitted to deny his membership on the sole ground of his failure to sign the by-laws, for the purpose of showing that the loan was *ultra vires* and not to be enforced against him.³⁰ But the signing of a mort-

Ill. 182; Setliff v. North Nashville B. & S. Asso., (Tenn.) 39 S. W. Rep. 546; Mech. &c. B. A. v. Wilcox, 24 Conn. 147. Nor does the fact that, by reason of an excessive assumption of authority on the part of the association indicating the terms of the loan made to such member, he escapes the full extent of the obligation he was intended to be saddled with affect his rights or liabilities as a stockholder: *Ibid*.

²⁸ German Union B. & S. F. Asso. v. Sendmeyer, 50 Pa. St. 67; Endl., B. A., § 78. Where a *feme sole* held stock in a building association, in the name of a trustee, paying the monthly dues by an agent, who meanwhile borrowed money from the association to the full value of the stock, gave a mortgage therefor and eventually had this mortgage satisfied by giving up the stock, which, however, continued to stand untransferred in the name of the trustee; on bill filed by the latter and his *cestui que trust* to secure the value of the

stock, it was held that the complainants were not estopped by the trustee's silence when the agent's name, instead of his, was called to answer for monthly dues, because the association, while the shares stood untransferred, could not be misled by such silence: Larkins' App., 38 Pa. St. 457.

²⁹ North American B. Asso. v. Sutton, 35 Pa. St. 463; Lime City B., L. & S. Asso. v. Black, (Ind.) 35 N. E. Rep. 829. But the acceptance must have been distinctively the act of the association, or such portion of it as can legally bind the whole; wherefore, an acceptance of dues by two out of twelve directors, from one whose shares were, under the rules, forfeited, was held not a waiver of the forfeiture, where the acceptance was, at the first subsequent board meeting, disavowed and the money returned. Card v. Carr, 1 C. B. (N. S.) (87 Engl. C. L. R.) 197.

³⁰ Howard Mut. L. & F. Asso. v. McIntire, 3 Allen (Mass.) 571; and in Concordia &c. Asso. v. Read, 93 N.

gage reciting the mortgagor as a member of the association mortgagee, where such recital has arisen from demonstrable error or accident, and the actual state of fact is clearly shown to contradict the recital, will not create such an estoppel.³¹

§ 8713. **Termination of Membership.**—The relation of membership in a building association is terminated, with all its attending rights and liabilities, (1) by the death of the member; (2) by transfer of his shares to another; (3) by voluntary withdrawal in accordance with the provisions of the statute, charter and by-laws governing the association, or in pursuance of some special arrangement or composition, or by application of the value of his shares to his debt, if he be a borrower; (4) by forfeiture of membership, in the manner and for the causes set forth in the rules of the society and not repugnant to law; (5) by dissolution, or what amounts to dissolution of the society, or by the expiration of the series in which the member's stock stood; (6) in case the member has become a borrower, by the terms of his contract with the association, if they warrant and contemplate such a conclusion.³²

§ 8714. **Distinction between Depositors and Members.**—Depositors, in building associations, are not properly members of it. They are not liable to all the duties of membership, nor entitled to all its benefits. They constitute that class of persons who use its treasury as a savings bank in which to deposit, from time to time, small sums of money, with the privilege of drawing them, thereafter, under certain restrictions, and with the addition of interest allowed at a moderate rate.³³ They are bound by the rules of the association.³⁴ But as to their deposits, they are creditors of it.³⁵

Y. 474; Parker v. U. S. &c. Asso., 19 W. Va. 744. In Build'g Asso. v. Steele, 11 W. N. (Pa.) 204, a married woman, who, with her husband, had signed a mortgage to the association reciting that he was the owner of a certain number of shares, some of which stood in his name as trustee for her, was held estopped from subsequently disputing his ownership of them as against the association. latterly been largely adopted in American building associations. See Baker v. People's &c. Asso., 42 Ohio St. 655; but compare Forest City &c. B. Asso. v. Gallagher, 25 Ohio St. 208.

³¹ Victoria Permanent Benefit &c. Soc., Epson's Case, 22 L. T. (N. S.) 855; 18 W. R. 565; L. R., 9 Eq. 597.

³² Endl., B. A., § 61; *infra*, § 8717.

³³ Endl., B. A., § 56. This feature, popular in England and Germany, has

³⁴ In re Victoria Perm. &c. Soc., Hill's Case, Jones' Case, L. R. 9 Eq. 605; Criswell's App., 100 Pa. St. 488, 491.

³⁵ Ibid., and as such entitled to payment of their claims, *pari passu* with other outside creditors, in preference to the stockholders: and a stockholder may, at the same time, sustain the relation of a depositor: Ibid.

CHAPTER CCXXXVII.

DUTIES AND LIABILITIES OF MEMBERS.

SECTION

8716. Duties and liabilities of members.

8717. Duty as to the payment of dues.

8718. Enforcement of dues by suit.

8719. Society's lien for arrears of dues.

SECTION

8720. Fines and forfeitures for non-payment of dues.

8721. Duty to contribute for losses and expenses.

8722. Liability of members for corporate debts.

§ 8716. **Duties and Liabilities of Members.**—The relation of membership brings with it certain duties and certain rights. Independently of any formal assumption of the former,¹ the law imposes upon each member, as springing from an implied but binding contract involved in that of membership, the duty of obedience to the rules of the association, not only to such as exist at the time of his reception into it, but also to all such other rules, by-laws and orders as may, at any future time, be lawfully established.²

§ 8717. **Duty as to the Payment of Dues.**—The prompt observance of the rules of the association, and the obligations assumed by the member in respect to stock payments is essential to the success of the enterprise. This duty involves that of making the payment at the time and place, and in the manner and to the person

¹ See *supra*, § 8708, note.

² Endl., B. A., 62; Angell & Ames, Corp., § 499; Field, Corp., § 226. In *Nickels v. Asso.*, 93 Va. 380; 25 S. E. Rep. 8, it is held that a member of (even a foreign) building association is presumed to have notice of its by-laws. *McKenney v. Diamond State L. Asso.*, 8 Houst. (Del.) 557; 18 Atl. Rep. 905, decides that a member is not bound by a new by-law unless he is proved to have had actual notice of it; whilst in *Pawlick v. Homestead Loan Asso.*, 37 N. Y. Supp. 164, is said to be bound by amendments regularly adopted, (the articles

of the society providing for amendment) although he had no notice of them. In trusts, the principle stated in the text does not result from any doctrine imputing to the member notice of the new by-law, but from the implied terms of his agreement of membership, binding him, and pledging in advance his assent, to every by-law duly adopted pursuant to the charter, the question of notice, actual or constructive, being wholly immaterial. 1 *Morawetz, Priv. Corp.*, § 500a; *Build. & Loan News*, Apr. 1890.

appointed by the constitution or by-laws; wherefore, no other payments will ordinarily bind the association.³ Moreover, it is absolute upon the member and ceases only with the cessation of his membership, or the determination of the society, or the abandonment of its business.⁴ Default of other members, not amounting to one of these, affords no excuse to any particular one.⁵ The liability for dues does not arise, however, where the amount of capital stock is fixed and the number of shares to be issued ascertained by the charter, until the whole capital stock has been subscribed for,⁶ unless that condition be waived by the subscribers, as it will be, if, knowing that the whole capital stock has not been taken, they permit the company to be organized, attend its meetings, co-operate in the votes for the expenditure of money, for the purchase of property, the making of contracts, and other similar acts which could only properly be done upon the assumption that the subscribers intended to proceed with the stock taken up.⁷

§ 8718. **Enforcement of Dues by Suit.**—Payment of dues may, whenever neglected, be enforced by the association by suit,⁸ without notice to the delinquent member of the fact of his delinquency or the intention to sue, unless such notice be required by the rules.⁹

³ E. g., payments not made in cash, the only kind receivable: *People's B. & L. Asso. v. Wroth*, 43 N. J. L. 70; *Mut. B. & L. Asso. v. Hammell*, id. 78; *Muller v. Cohen*, 27 Ohio L. J. 353,—or not made at a regular stated meeting where that is required: *Morrow v. James*, 4 Mackey (D. C.) 59, unless a contrary practice has been established: *Haverson v. Cole*, 6 W. R. 17,—or to the secretary instead of the treasurer: *Brown v. Sanders*, 20 D. C. 455; *Van Wagenen v. Genesee Falls Perm. B. & L. Asso.*, 34 N. Y. Supp. 491,—especially where, in receiving them, he acted without the knowledge of the society's directors and as the member's agent for transmission to the society: *Killian v. Bldg. Asso.*, 21 Pa. C. C. Rep. 58. But a course of dealing on the part of the society departing from the strict requirements of its rules in this particular will estop it from asserting them as against one misled by the practice followed: *Ibid.*; *Haverson v. Eversole*, 6 W. R. 17; *Davis Bldg. & C. Soc.*, p. 122, note.

⁴ Membership does not cease by reason of the fact that a member has incurred the additional obligations of a borrower: *Delano v. Wild*, 6 Allen (Mass.) 1; *Eversmann v. Schmitt*, 53 Ohio St. 174; 41 N. E. Rep. 139, and hypothecated his stock to the society as security for his debt: *Boyd v. Robinson*, (Ga.) 31 S. E. Rep. 39; *Fisher v. Patton*, 134 Mo. 32; 34 S. W. Rep. 1096; *Leahy v. Nat. B. & L. Asso.*, (Wis.) 76 N. W. Rep. 625.

⁵ *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428.

⁶ *Morrison v. Dorsey*, 48 Md. 461.

⁷ *Ibid.*; *Endl.*, B. A., § 85.

⁸ *Build. Asso. v. Kribs*, 7 Leg. & Ins. Rep. (Pa.) 21; *Morrison v. Dorsey*, 48 Md. 461. And so may his guarantor or surety: *Georgia State B. & L. Asso. v. American Invest. & Loan Co.*, (Ga.) 29 S. E. Rep. 299 (in this case for construction and effect of contract guaranteeing borrower's payments up to a certain sum).

⁹ *Morrison v. Dorsey*, *supra*. A statutory direction to corporations generally to give notice to members of

Nor does the entry of suit against a member relieve him from continuing his payments, or from the consequences and penalties resulting, under the rules of the society, from his neglect to do so.¹⁰ If he be at the same time a borrower, his bond or mortgage, even after satisfaction or payment of the amount loaned or stipulated to be repaid, and interest, remains as a security for the faithful performance of his duties as a member, such being part of the condition of the obligation, and may be used to enforce further payment of his dues and other charges.¹¹

§ 8719. **Society's Lien for Arrears of Dues.**— In addition to this remedy, the statutes of the various States regulating building associations, or else their constitutions or by-laws, generally give them a lien upon the defaulting member's shares for the amount of unpaid installments and other charges and liabilities of membership.¹² Under such provisions a member cannot withdraw stock thus incumbered,¹³ nor reduce it and demand a new certificate for a less number of shares.¹⁴ Nor can he pledge it except subject to the lien,¹⁵ or transfer it without similar qualifications.¹⁶

§ 8720. **Fines and Forfeitures for Non-Payment of Dues.**— The most usual and effective method, however, of securing punctuality on the part of the members in the discharge of their duties as to stock payments, is the system of fines and forfeitures; the former being additional payments, exacted by authority of statute and regulated by by-law, as liquidated damages for the forbearance

calls upon subscriptions does not apply to building associations: *Ibid.*

¹⁰ *Endl.*, B. A., § 70; *German Fair Hill B. Asso. v. Metzger*, 3 W. N. (Pa.) 204; *Union B. L. Asso. v. Masonic Hall Asso.*, 29 N. J. Eq. 389. Compare, *infra*, § 8777, and notes.

¹¹ *Endl.*, B. A., §§ 67, 69; *Everham v. Oriental S. & L. Asso.*, 47 Pa. St. 352; *Sparrow v. Farmer*, 26 Beav. 511; *Handley v. Farmer*, 29 id. 362; *Farmer v. Smith*, 4 H. & N. 196; *Eversmann v. Schmitt*, 53 Ohio St. 174; 41 N. E. Rep. 139. So a decree, in a suit to foreclose a borrower's mortgage upon default, fixing the amount due, will stand as a security for future installments and liabilities, though the mortgagor, asserting his right to redeem before actual sale, by paying the amount ascertained by

the decree, may stop the sale of the property: *Robertson v. American Homest. Asso.*, 10 Md. 397; *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186; *Risk v. Delphos B. & S. Asso.*, 31 id. 517.

¹² *Endl.*, B. A., §§ 66, 475.

¹³ *McGrath v. Hamilton S. & L. Asso.*, 44 Pa. St. 383; *Watkins v. Workmen's B. & L. Asso.*, 97 id. 514; *Anderson B. & C. Asso. v. Thompson*, 88 Ind. 405; *Hawkeye Ben. & L. Asso. v. Blackburn*, 48 Iowa, 385.

¹⁴ *Fulton v. American B. & L. Asso.*, 46 Minn. ; 48 N. W. Rep. 781; *Eaton v. American B. & L. Asso.*, 47 Minn. 236; 49 N. W. Rep. 865.

¹⁵ *Société Canad-Franç de Construction v. Davelny*, 20 Can. S. C. 449.

¹⁶ *Thirty-first Street B. & L. Asso. v. Wetherell*, 43 Ill. App. 509.

of payments required to be periodically made,—and the latter bringing about an enforced cessation of membership as the prescribed result of delinquencies enumerated as so punishable by the by-laws. The subject of fines will be discussed at length hereafter.¹⁷ Forfeiture of membership is the only complete means the association has of protecting itself against habitual, frequent and long-continued defaults and the consequent arrangement of its accounts and other obvious inconveniences.¹⁸ Provisions for forfeiture, therefore, not fixing too short a period of grace,¹⁹ have been expressly held reasonable and competent.²⁰ And no notice is required (unless directed by statute, charter or by-law) before declaring it.²¹ But the causes of forfeiture must be distinctly defined by the by-laws,²² and the method then pointed out of its enforcement exactly pursued.²³ Nor can this penalty be applied except in cases falling strictly within the letter and spirit of the rule.²⁴ Hence, under a rule authorizing forfeiture upon a continuous default of six months, it cannot be enforced against a member who is in arrears five months and then pays up for each succeeding month.²⁵ Moreover, it never takes place until declared against a member by the society or its competent officers.²⁶ It may be waived either expressly or by implication,²⁷ and its enforcement is at all times at the option of the directors.²⁸ Forfeiture of stock is necessarily

¹⁷ *Infra*, §§ 8777-8778.

¹⁸ See *Endl., B. A.*, § 72. There may also be other causes of forfeiture, such as gross impropriety of conduct, crime, etc.: *Ibid.*, § 73.

¹⁹ Usually it is six months.

²⁰ *Card v. Carr*, 1 C. B. (N. S.) (87 *Engl. C. L. Rep.*) 197; *Freeman v. Ottawa &c. Asso.*, 114 Ill. 182.

²¹ *Ibid.*

²² *Occidental B. & L. Asso. v. Sullivan*, 62 Cal. 394.

²³ *Endl., B. A.*, § 74. Also in the subsequent disposition of the stock forfeited: *Allen v. Amer. B. & L. Asso.*, (Minn.) 52 N. W. Rep. 144.

²⁴ *Build. & L. News*, Dec., 1889.

²⁵ *Build'g Asso. v. Hopple*, 12 W. N. (Pa.) 222.

²⁶ *Watkins v. Workingmen's B. Asso.*, 97 Pa. St. 514; *Reg. v. D'Eyncourt*, 4 Best & S. (116 *Engl. C. L. Rep.*) 820. Hence the bringing of suit against a defaulting member, though a borrower, is not necessarily a forfeiture of his stock or member-

ship: *Massey v. Cit. B. & S. Asso.*, 22 Kan. 624; *North America B. Asso. v. Sutton*, 35 Pa. St. 463. And see *Robertson v. American Homest. Asso.*, 10 Md. 397; *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186; *Risk v. Delphos B. & S. Asso.*, 31 id. 517; *Somerset County B. L. & S. Asso. v. Vandervere*, 11 N. J. Eq. 282; *Cit. Mut. L. &c. Asso. v. Webster*, 25 Barb. (N. Y.) 263; *Endl., B. A.*, §§ 150-152.

²⁷ *Watkins v. Workingmen's B. Asso.*, *supra*; *North American B. Asso. v. Sutton*, 35 Pa. St. 463; *Massey v. Cit. B. & S. Asso.*, 22 Kan. 624; *Ocmulgee B. & L. Asso. v. Thomson*, 52 Ga. 427; *Overby v. B. & L. Asso.*, 81 N. C. 56; *Lime City B. L. & S. Asso. v. Black*, (Ind.) 35 N. E. Rep. 829. But the waiver must be distinctly the act of the association or such portion of it, or of its board of directors as is competent to bind it: *Card v. Carr*, 1 C. B. (N. S.) (87 *Engl. C. L. Rep.*) 197; *supra*, § 8712, note.

²⁸ *Moore v. Rawlins*, 6 C. B. (N.

forfeiture of membership, and *vice versa*.²⁹ When it takes place, the obligation to continue payment of dues, the consequence and necessary incident of membership, is at an end.³⁰ But it is the general understanding that it cannot be enforced without giving the member a credit for the stock forfeited.³¹ What that credit shall be, will, within the limits of reason and fairness, be left to the by-laws.

§ 8721. **Duty to Contribute for Losses and Expenses.**—Being equally entitled with all other shareholders, in the direct ratio of his interest in the society, to share in the common gains of the enterprise, every member is liable to contribute, in the same proportion, to the losses and expenses incident to its operations.³² He cannot evade this liability by a transfer of his stock without the consent of the association,³³ nor ordinarily by withdrawing from it.³⁴ The association may retain from withdrawing stockholders their proportion of a manifest loss sustained, e. g., by reason of the depreciation of real estate purchased by it at a sale under its mort-

S.) 289; Build'g & L. News, Dec., 1889. And see Lime City B. L. & S. Asso. v. Black, *supra*,

²⁹ Hatfield v. Huntington City B. & L. Asso., 132 Ind. 149; 31 N. E. Rep. 532; Endl., B. A., § 75.

³⁰ McCahan v. Columbia B. Asso., 40 Md. 226.

³¹ Massey v. Cit. B. & S. Asso., 22 Kan. 624; Amer. Homest. Co. v. Lini-gan, 46 La. An. 1118; 15 So. Rep. 369; Rowland v. Old Dominion B. & L. Asso., 115 N. C. 825; 18 S. E. Rep. 965; s. c. 116 N. C. 877; 22 S. E. Rep. 8; s. c. 118 N. C. 173; Randall v. Nat'l B., L. & P. Union 43 Neb. 876; 62 N. W. Rep. 252. And see North Amer. B. Asso. v. Sutton, 35 Pa. St. 463; but compare Ottawa &c. Asso. v. Freeman, 114 Ill. 182.

³² McGrath v. Hamilton B. Asso., 44 Pa. St. 383.

³³ Endl., B. A., § 77.

³⁴ McGrath v. Hamilton B. Asso., *supra*; U. S., B. & L. Asso. v. Silverman, 85 Pa. St. 394; Wittman v. Bldg Asso., 7 W. N. (Pa.) 80; though it is said that a building society may be formed on terms allowing withdrawals free from all liability in the event of winding up: Re Borough Commerce & Buildg. Soc., [1893] 2 Ch. 242, and that, if the by-laws distinctly entitle

a member withdrawing to a specific allowance, providing for no reduction on account of losses and expenses, his right thereunder is a contract right, and as such absolute and beyond the power of the association against his consent to modify or curtail, e. g., by a by-law passed in consequence of the depreciation of its property and providing that a certain proportion be deducted from the withdrawal credits as computed under the original rule and placed to a suspension account: Auld v. Glasgow &c. B. Soc., 12 App. Cas. 197; Brownlie v. Russell, 8 id. 235; Tosh v. North British &c. Soc., 11 id. 489. (And see, to similar effect, Holyoke B. & L. Asso. v. Lewis, 1 Col. App. 127; 27 Pac. Rep. 872.) But this doctrine is untenable: See Rosenberg v. Northumberland B. Soc., L. R. 22 Q. B. 373; Pepe v. City & Suburban Perm. B. Soc., [1893] 2 Ch. 311; Kemp v. Wright, [1894] 2 Ch. 462; Bradbury v. Wild, [1893] 1 Ch. 377, 390; Englehardt v. Fifth Ward Perm. Dime S. & L. Asso., 148 N. Y. 281; 42 N. E. Rep. 710 (reversing 25 N. Y. Supp. 835); Hawley v. North Side B. & L. Asso., (Col.) 52 Pac. Rep. 408,—and *infra*, § 8732; Endl., B. A., §§ 109, 141–142.

gage;³⁵ or where a member has been released, receiving an amount which should have been subject to reduction because of losses, he may, it is said, be made liable therefor in a proceeding to wind up the society, to which he is made a party.³⁶ Nor is the liability in question affected by the fact that the member has become a borrower,³⁷ so long as, being such, he still continues a member.³⁸ But it ceases with the cessation of membership, *bona fide* and with the consent of the association,³⁹ as where, upon becoming a borrower, the member relinquishes his membership,⁴⁰ or where he avails himself of a provision in the rules or by-laws of the association, or of the statute supreme over it, or of a special composition with the association,⁴¹ to withdraw himself from it.⁴²

³⁵ *Knoblauch v. Robert Blum B. & L. Asso.*, 8 Pittsb. Leg. J., (N. S.) (Pa.) 39; *Taffert v. Same*, ib. 40, even before a final determination of the amount of the loss by a resale, the society being at liberty to have the property appraised by a committee and assess the loss on each share of stock equally: *Ibid.*

³⁶ *Cason v. Seldner*, 77 Va. 293. But an indefinite allegation of loss, set up by way of defense by a building association sued by a withdrawing member (where such suit can be maintained: *infra*, § 8732), ought not to prevent judgment in his favor for the full amount of his claims: *U. S. B. & L. Asso. v. Silverman*, *supra*.

³⁷ *Pattison v. Albany B. & L. Asso.*, 63 Ga. 373; *McGrath v. Hamilton B. Asso.*, *supra*; *Callahan's App.*, 124 Pa. St. 138; 16 Atl. Rep. 638; *Seibel v. Victoria B. Asso.*, 43 Ohio St. 371; *Eversmann v. Schmitt*, 53 id. 174; 41 N. E. Rep. 139; *Towle v. Amer. B. L. & S. Soc.*, 61 Fed. Rep. 446; *Re West Riding of Yorkshire Permanent B. B. Soc.*, L. R. 43 Ch. D. 407. In this case it was said that the rule of a building society providing that a deficiency in the amount necessary to meet expenditures and liabilities shall be apportioned between investing and borrowing members constitutes a special contract between the members, under which advanced or borrowing members are liable to contribute ratably with investing members, both towards paying outside creditors and in sharing the other losses incurred by the society.

³⁸ See *Endl.*, B. A., §§ 79-80.

³⁹ *Id.*, § 81.

⁴⁰ So that his only relation, thereafter, to the association, is that of debtor: *Bowker v. Mill River L. F. Asso.*, 7 Allen (Mass.) 100. See *Dennison v. Alpena L. & B. Asso.*, (Mich.) 75 N. W. Rep. 300.

⁴¹ *Endl.*, B. A., §§ 81-82; *Miller v. Jefferson B. Asso.* 50 Pa. St. 32; *Booz App.*, 109 id. 592; *Eyre v. Bldg. Asso.*, 17 Leg. Int. (Pa.) 148; *Archer v. Harrison*, 7 De G., M. & G. 404; *Wangerien v. Aspell*, 42 Ohio St. 655; 24 N. E. Rep. 405. The ultimate disadvantageousness to the association of a composition fairly and honestly made does not invalidate the discharge of the withdrawing member from further liability. *Ibid.*: *Priestly v. Hopwood*, 12 W. R. 1031; 10 L. T. (N. S.) 646; *Booz' App.*, *supra*,—any more than the shareholder, who, by such composition, has assumed certain obligations in exchange for others, can be relieved from them upon the plea of illegality in the conduct of the officers of the association sanctioning the arrangement: *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428. But a composition to the disadvantage of the association, between it and its officers, is not binding upon the former: *Quin v. Smith*, 108 Pa. St. 325; *Callahan's App.*, 124 id. 138; 16 Atl. Rep. 638; *Pangborn v. Citizens' &c. Asso.*, 35 N. J. Eq. 341.

⁴² Upon the subject of withdrawals, see *infra*, §§ 8729-8736.

§ 8722. **Liability of Members for Corporate Debts.**— Apart from any statutory exception, there is no different liability upon the individual members of a building association for its debts to third parties, than upon the stockholders of any other corporation. Each is, in general, liable to the extent of his stock interest, i. e., the par value of the stock standing in his name, together with the unpaid subscriptions thereon.⁴³ And if he is himself a creditor of the association, he may set off his claim against his liability.⁴⁴ But corporate property may, in a proper case, be followed into the hands of a stockholder who has acquired it in violation of the rights of the association's creditors.⁴⁵

⁴³ State Sav. Asso. v. Kellogg, 63 Mo. 540.

⁴⁴ Remington v. King, 11 Abb. Pr. (N. Y.) 278.

⁴⁵ Endl., B. A., § 84; Chambersburg Woolen Co. v. Chamb. Manuf. & Bld'g Asso., 31 Leg. Int. (Pa.) 357; Tebo v. Hammond, 30 Beav. 495.

CHAPTER CXXXVIII.

RIGHTS OF MEMBERS.

SECTION	SECTION
8724. Rights of members, especially with reference to loans.	8731. Special arrangements for withdrawal: notice of same.
8725. Preference over outsiders with respect to loans.	8732. Effect of withdrawal.
8726. Free competition in loans: fixed premium: security.	8733. Limitations upon right of withdrawal.
8727. Society not concerned with application of money loaned.	8734. Right of withdrawal restricted to unadvanced members.
8728. Proportion of loans to stock.	8735. Effect of withdrawal upon the status of borrowing members.
8729. Withdrawal of members.	8736. Rights upon maturity of stock.
8730. Terms of withdrawal of members.	

§ 8724. Rights of Members, especially with Reference to Loans.—

The rights of members of building associations, as corporators, are, in every respect, so far as applicable, the same as those conceded to the members in any other corporation.¹ The distinctive and most important right which every member of the former has, by virtue of his being a shareholder and investor,—the right, indeed, which draws into its circle that class of persons of whom legitimately the membership ought to be composed and for whose benefit the entire scheme was devised and has been countenanced by law,—is that of receiving loans or advances from the association

¹ See Endl., B. A., §§ 86-87. It has been the custom in building associations to restrict the right of each member to vote to a single ballot, irrespectively of the number of shares held by him,—a practice, no doubt, growing out of and remaining from the original system (see account of the Greenwich Union B. Asso., in Pratt v. Hutchinson, 15 East, 511; Endl., B. A., § 5; also Cutbill v. Kingdom, L. R. 1 Exch. 494) allowing but one share to each member. Ordinarily the vote must be cast in person: Endl., B. A., § 86; Build. & L. News, Nov. 1890; but compare State v. Rohlfes, (N. J.) 19 Atl. Rep. 1099; Continental Invest. & L. Soc. v. People, 167 Ill. 195; 47 N. E. Rep. 381. A pledgor of stock retains his right to vote and hold office as a member: Mechanics' B. & L. Asso. v. Conover, 14 N. J. Eq. 219, not disturbed in this particular by s. c., 17 id. 497. See People's B. & L. Asso. v. Furey, 47 N. J. Eq. 410; 20 Atl. Rep. 890.

upon proper security. It, no doubt, lay in the original plan of the institution, that every member should eventually become a borrower.² Certainly, every member has a right to become such, if he can furnish the proper guaranties and is willing to pay the premium which fair competition with his fellows desirous of obtaining the same accommodation may fix as the value of his preference. In order to serve this purpose the more effectually, by prescribing the period and manner in which loans are to be granted and making these directions obligatory upon the association, as well as notorious and intelligible to the members, most of the statutes governing building associations require their officers to offer the money on hand, when it amounts to a certain sum, at stated periods, for sale to the stockholders, and to award the loans to the highest bidder, and also limit the proportion of the corporate income applicable to the satisfaction of the claims of withdrawing members.

§ 8725. Preference over Outsiders with Respect to 'Loans.—

Where such provisions are contained in the enactment supreme over the association, or embodied in its charter, it follows that the members are entitled to the refusal of the money,³ to the exclusion, so long as there are such willing and able to take and secure the loans, of outsiders and outside investments,⁴ and that contracts⁵ made with building associations, and rules and regulations⁶ made by them are illegal, where their operation is such as to defeat this right.

² *Endl., B. A., § 17; Seibel v. Victoria B. Asso., 43 Ohio St. 371, 373.*

³ *Bergman v. St. Paul Mut. B. Asso., 29 Minn. 282; 13 N. W. Rep. 122.*

⁴ *Endl., B. A., §§ 89-94.* A building association has, however, under circumstances not conflicting with this rule, the right to loan its money to strangers: *Union B. L. Asso. v. Masonic Hall Asso., 29 N. J. Eq. 359; Cutbill v. Kingdom, 1 Exch. 494; unless its so doing is prohibited by statute, in which case any contract attempting to evade such prohibition is void: Nat'l Investment Co. v. Nat'l S., L. & B. Asso., 49 Minn. 517; 57 N. W. Rep. 138; Anderson v. Cleburne B. & L. Asso., (Tex.) 16 S. W. Rep. 298.* Whilst a mere violation of the

society's by-laws in loaning its money to one not a member cannot by the latter be set up as a defense in a suit by the society for the recovery of the loan: *Reynolds v. Georgia State B. & L. Asso., (Ga.) 29 S. E. Rep. 187.* See this case as to loan to one intending to become a member: *infra, § 8756, note.*

⁵ See *Parker v. Fulton L. & B. Asso., 46 Ga. 166; Mills v. Salisbury B. & L. Asso., 75 N. C. 292; Latham v. Washington B. & L. Asso., 77 id. 145; Herbert v. Kenton B. & S. Asso., 11 Bush (Ky.) 296.*

⁶ See *Martin v. Nashville B. Asso., 2 Cold. (Tenn.) 418; Herbert v. Kenton, B. & L. Asso., supra.*

§ 8726. Free Competition in Loans: Fixed Premium: Security.—

It follows, in the next place, that the person, who, upon a fair and free competition,⁷ becomes the highest bidder, is, if he can substantiate his claim to the loan by offering the proper security, absolutely entitled to receive it. Hence, in the face of a statutory or charter provision entitling the highest bidder to preference, a rule of the association establishing a "fixed premium," i. e., a sum declared to be the minimum bid receivable, is of no validity,⁸ and its operation to the injury of the bidder may by him be set up as a defense, to the extent to which he has been obliged, by reason of its existence, as distinguished from the effect of competition, to bid higher than he otherwise would have been obliged to go.⁹ Of course, the ultimate right of the highest bidder to receive the loan depends upon his ability to furnish the requisite security.¹⁰ A stockholder's claim to a loan to which the rules of the association declare him entitled will be sustained.¹¹ Equity will not, however, enforce specific performance in his favor where the society's solicitor deems the title of the property offered as security defective.¹² On a promise of a loan by the society to a member, he cannot, upon the refusal of the former to give him the money, recover it by an action of assumpsit, even after his mortgage has, without the society's consent, been placed upon record by its attorney, though he might have an action for breach of contract.¹³ But, if the society intrusts the money granted to him to a member of its committee to be paid out for lumber (that being the purpose of the loan) the borrower has a right of action against him and the association for the money intended for him and appropriated by the trustee for a private debt due him individually by the borrower.¹⁴

⁷ See *infra*, § 8780.

⁸ *State v. Greenville B. Asso.*, 29 Ohio St. 92; *State v. Oberlin B. & L. Asso.*, 35 id. 258; *Stiles' App.*, 95 Pa. 122; *Albright v. Lafayette B. & S. Asso.*, 102 id. 411.

⁹ *Stiles' App.*, *supra*; *Albright v. Lafayette B. & S. Asso.*, *supra*; *Orangeville Mut. S. F. & L. Asso. v. Young*, 9 W. N. (Pa.) 251; *Myers v. Alpena L. & B. Asso.* (Mich.) 75 N. W. Rep. 944; *Post v. Mechanics' B. & L. Asso.*, 97 Tenn. 408; 37 S. W. Rep. 216.

¹⁰ *Conklin v. People's B. & L. Asso.*, 41 N. J. Eq. 20; 3 Centr. Rep. 74.

What security may be demanded, unless prescribed by statute or by-law, is within the sound discretion of the society and its directors, the latter being, as will hereafter be seen, accountable for gross abuse and negligence.

¹¹ *Bergman v. St. Paul B. Asso.*, 29 Minn. 282.

¹² *Conklin v. People's B. & L. Asso.*, *supra*.

¹³ *Conway v. Log Cabin Perm. B. Asso.*, 52 Md. 137.

¹⁴ *Bennett v. Merchantsville B. & C. Asso.*, 44 N. J. Eq. 116.

§ 8727. Society not Concerned with Application of Money Loaned.

— The society being obliged to give the money to the highest bidder offering adequate security, it necessarily results that it is absolved from the duty of looking to its application.¹⁵

§ 8728. Proportion of Loans to Stock.— The proportion which the loans grantable to any member shall bear to the amount of stock held by him is, in the absence of statutory or by-law regulation, within the sound discretion of the directors.¹⁶

§ 8729. Withdrawal of Members.— Although the member's connection with the association is essentially similar to that of one of a partnership formed for a definite period, or for the accomplishment of a specific object, with the right only upon its determination to reap the benefits of his investment, so that a failure to continue in the concern is really in the nature of a breach of contract, yet the necessities of the case require that provision should be made for a severance of that connection before the date originally contemplated, upon terms fair and equitable to both parties.¹⁷ It is said, that, the basic idea of a building association being to continue membership until the life of the association terminates or a series matures, no right sooner to withdraw exists apart from statute or by-law.¹⁸ The right, however, being given, it is a breach of duty in the association to invest its funds so closely as to leave none available for the satisfaction of withdrawal claims.¹⁹ Where the right to withdraw rests upon the laws of the association when a member joins it, it cannot be afterwards taken away by a repeal of the by-law that gave it.²⁰ Where it is given by statute, it rests in public policy and cannot be waived, even by an express declara-

¹⁵ *Juniata B. & L. Asso. v. Mixell*, 84 Pa. St. 313; *Albright v. Lafayette B. & L. Asso.*, 102 id. 411; *Johnston v. Elizabeth B. & L. Asso.*, 104 id. 394; *Hagerman v. Ohio B. & L. Asso.*, 25 Ohio St. 186; *Cutbill v. Kingdom*, 1 Exch. 494. And see *Manuf. & Mech. S. & L. Co. v. Conover*, 5 Phila. (Pa.) 18; *Becket v. Uniontown B. Asso.*, 88 Pa. St. 211; *Relief &c. Asso. v. Longshore*, 8 Luz. Leg. Reg. (Pa.) 199; *Endl., B. A.*, § 97. See, however, to the contrary, *Pfeister v. Wheeling B. Asso.*, 19 W. Va. 676.

¹⁶ *Endl., B. A.*, § 98. The general practice is (see *ante*, § 8728) to give him, if he desires, one loan for every

share held by him, i. e., an amount nominally equal to the par value of the shares held by him.

¹⁷ See *Endl., B. A.*, § 99.

¹⁸ *Beach v. Co-op. S. & L. Asso.*, (S. Dak.) 74 N. W. Rep. 889.

¹⁹ *Nat'l. L. & H. Asso. v. Hubley*, 34 Leg. Int. (Pa.) 6. And see *Wolfe v. Courkey Ave. &c. Asso.*, 27 N. Y. Supp. 44.

²⁰ *Englehardt v. Fifth Ward Perm. D. Sav. & L. Asso.*, 148 N. Y. 281; 42 N. E. Rep. 710. The doctrine laid down in *Holyoke B. & L. Asso. v. Lewis*, 1 Colo. App. 127; 27 Pac. Rep. 872, goes too far. Substantially the same doctrine declared in the above case as re-

tion in the certificate of stock issued and accepted, that there shall be no such right.²¹ A building association, however, is not a bank of deposit,²² in which a member places his funds subject to call. Nor is it, like a factor, accountable to him, at any moment, for the gains made by the turning over of these funds.²³ It is rather to be likened, in its relation to the members, to a trustee for a definite and specific purpose. As such, it receives the funds and administers them, and only upon the accomplishment of the purpose, or the expiration of the time limited for its accomplishment, is it liable finally to account to each member for the sums contributed by him, the profits made before their investment and the losses and expenses chargeable to them throughout the whole period of the business.²⁴ To state an account involving these items, for any particular member, at any stage intervening between the commencement of the society and its winding up, in order to ascertain the value of his shares, would be difficult, practically impossible.²⁵ Where, as formerly in Connecticut, the shares have an ascertained value in the stock market, the difficulty is reduced to a minimum.²⁶ But that is now rarely, if ever, the case. Hence it is usual for the statutes governing the incorporation and management of building associations to declare the right of every unadvanced member to withdraw, upon certain notice given to the society, and with some proportion of profits to be determined by its by-laws,²⁷ providing, in some instances, that those who have been members for less than a year, shall not be entitled to any profits, unless by the grace of the association, and that only a certain proportion of its funds shall, at any one time, be applied in satisfying withdrawing members.²⁸ In the absence of any specification, and there being no proof of losses, etc., the amount with-

ported in 25 N. Y. Supp. 835, was reversed on appeal. See *ante*, § 8716, and *infra*, §§ 8732, 8770.

²¹ *Latimer v. Equitable L. & Inv. Co.*, 81 Fed. Rep. 776; so that a statutory right to withdraw on thirty days' notice is not affected by such declaration that there shall be no withdrawal until one hundred months from date of issue. *Ibid*.

²² *Supra*, § 8700.

²³ The funds coming into its hands become its property: *Atwood v. Dumas*, 149 Mass. 167; 21 N. E. Rep. 236.

²⁴ See *Citizens' Mut. L. & A. T. Asso. v. Webster*, 25 Barb. (N. Y.) 264.

²⁵ *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 574; *Endl.*, B. A., §§ 100-101.

²⁶ See *Babcock v. Middlesex Sav. Bank & B. Asso.*, 28 Conn. 302.

²⁷ Where the statutes or the rules give the right to withdraw, with such share of profits as the directors may determine, they are bound to allow some: *Fleming v. Self*, 18 J. P. 296; 23 L. T. Rep. 63; *Kay*, 518; s. c., upon appeal, 3 Eq. Rep. 14; 24 L. T. Rep. 101; 3 DeG., M. & G. 987.

²⁸ *Endl.*, B. A., § 103. See *Quein v. Smith*, 108 Pa. St. 325; *infra*, § 8756, note.

drawable ordinarily is the aggregate of the stock payments made, with legal interest thereon.²⁹

§ 8730. **Terms of Withdrawal of Members.**— When prescribed by statute, the terms of withdrawal cannot be varied by charter, by-law, rule or resolution to the prejudice of the member without his consent.³⁰ In the absence of precise statutory provisions upon the subject, the matter of the terms of withdrawal is open to regulation either by charter and by-laws passed in accordance therewith, or by by-laws alone.³¹ If fairly within the limits of what is allowed by statute, such provisions will be binding.³² In case of uncertainty, their construction will be most favorable to the member.³³ They cannot be arbitrarily violated by the society.³⁴ Nor, where the rules make the right of withdrawal dependent upon the approval of the directors, can the same be unreasonably withheld.³⁵ In the absence of by-law provisions, withdrawals, in a solvent association, are payable in full in the order in which they are perfected.³⁶

§ 8731. **Special Arrangements for Withdrawal: Notice of Same.**

— It is, however, within the power of the association to hold out

²⁹ *Lepore v. Twin Cities Nat. B. & L. Asso.*, 5 Pa. Super. Ct. 276. Proof that a published notice of the withdrawal value of stock was posted in the society's office, without proof that it was done by the direction of the board of directors, is insufficient to entitle the withdrawing member to recover that value: *Hawley v. North Side B. & L. Asso.*, (Colo.) 52 Pac. Rep. 408. But having given notice of withdrawal in May, and having, on being told the society was unprepared then to pay him, continued payment of dues, etc., until October, when he was notified of the society's readiness to pay, he was held entitled to the withdrawal value as of October, and not as of May: *Ibid.*

³⁰ *Rhoads v. Hoernerstown B. & S. Asso.*, 82 Pa. St. 180 (the statute gave the right to withdraw on thirty days' notice, and the charter provision allowing it "only on good and sufficient cause shown, to be judged of by the board of directors" was held void); *Rodgers v. S. W. Mut. S. F. & B. Asso.*, 7 W. N. (Pa.) 95 (the statute being the same, the by-law compelling

withdrawing members to bid in competition for priority of payment was held void); and the law governing it that in force at the time the charter was granted: *Miller v. Jefferson B. Asso.*, 50 Pa. St. 32. And see *Latimer v. Equitable L. & Ins. Co.*, *supra*, § 8729.

³¹ *Endl., B. A.*, §§ 106-107; *Fitzgerald v. Hennepin Co. & C. Asso.*, (Minn.) 57 N. W. Rep. 1066.

³² *Beach v. Co-op. S. & L. Asso.*, (S. Dak.) 74 N. W. Rep. 889; *Synnott v. Iron Belt B. & L. Asso.*, 89 Fed. Rep. 292.

³³ *Fuller v. Salem & C. L. & F. Asso.*, 10 Gray, (Mass.) 94. And see *Baltimore B. & L. Asso. v. Powhatan Impr. Co.*, (Md.) 39 Atl. Rep. 274; *Southern B. & L. Asso. v. Harris*, (Ky.) 32 S. W. Rep. 261.

³⁴ *Pawlick v. Homestead L. Asso.*, 37 N. Y. Supp. 164; in this case provisions as to payment of withdrawals in order of notice.

³⁵ *Wetherwalgh v. Knickerbocker B. Asso.*, 2 Bosw. (N. Y.) 381.

³⁶ *Hoyt v. Intercean B. Asso.*, 58 Minn. 345; 60 N. W. Rep. 678.

and enter into special arrangements for withdrawals, and these, when honestly made and when accepted or acted upon by the members, are binding alike upon him and upon the association and its remaining members, whether the result turns out to be advantageous to the association or not.³⁷ But where the statute, or the rules lawfully established, or any special composition authorized by the society stipulate for certain notice³⁸ of intention to withdraw under them, a member, in order to entitle himself to the benefits held out, is bound to strict observance of such requirement,³⁹ unless the same be waived by the association, as it may be.⁴⁰

§ 8732. **Effect of Withdrawal.**— When he has brought himself within it, his position is a peculiar one. He is no longer fully a member. He cannot ordinarily exercise the functions of such.⁴¹ He can no longer transfer his stock.⁴² He is not liable for losses, etc., subsequently incurred,⁴³ nor for fines thereafter imposed,⁴⁴

³⁷ Endl., B. A., §§ 82, 105; *ante*, § 8721, note.

³⁸ Unless otherwise specified, verbal notice is sufficient; *St. Louis L. & Sav. Co. v. Yantis*, 173 Ill. 321; 50 N. E. Rep. 807.

³⁹ Endl., B. A., § 104; *Security Loan Asso. v. Lake*, 69 Ala. 456; *Hartford v. Co-op. Mut. Homest. Co.*, 128 Mass. 494; *Booz's App.*, 109 Pa. St. 592; *Steinberger v. Independ. L. & S. Asso.*, 84 Md. 625; 36 Atl. Rep. 439; *Beach v. Co-op. S. & L. Asso.*, (S. Dak.) 74 N. W. Rep. 889.

⁴⁰ *McKenney v. Diamond State L. Asso.*, (Del.) 18 Atl. Rep. 905. It will be held to have been waived where a verbal notice is accepted instead of the written one required by the rules; *ibid.*, or where, on notice being given to the secretary, the proper officer to receive it, he makes no objection to it, nor informs the party giving it of the necessity of any additional formalities: *Reynolds v. N. Y. B. & C. Co.*, 35 N. Y. Supp. 80. A notice of withdrawal, however, given to a special meeting of members, when required to be given to the directors, is not notice to the latter, though every officer and director be present; *Assigned Est. Wm. Brown B. Asso.*, 12 W. N. (Pa.) 207.

⁴¹ If he do, he may be treated as having waived his notice to withdraw: *Decatur B. & I. Co. v. Neal*,

97 Ala. 717; 12 So. Rep. 780; and conversely, where a member gave notice of withdrawal, was told the society was unable to pay him, and thereupon continued his periodical payments for several months longer, when he was notified of the society's readiness to pay, it was held, as against the building association, that he continued a member down to the latter date: *Hawley v. North Side B. & L. Asso.*, (Colo.) 52 Pac. Rep. 408. And so in the case of one who informed the secretary of his desire to withdraw and delivered to him his pass-book and certificate, and who a few weeks later decided to remain in the association, received from the secretary a new pass-book, crediting him with the amounts appearing by the old one to have been paid, and thereafter made additional payments: *Prairie State B. & L. Asso. v. Nubling*, 170 Ill. 240; 48 N. E. Rep. 1016.

⁴² *Henninghausen & Wolff v. Fisher*, 50 Md. 583, though he may assign to a member or a stranger unpaid balances due him thereon: *ibid.*

⁴³ *Miller v. Jefferson B. Asso.*, 50 Pa. St. 32; *U. S. B. & L. Asso. v. Silverman*, 85 id. 394; *Christian's App.* 102 id. 184; *Brown v. Sanders*, 20 D. C. 455.

⁴⁴ *Crenshaw v. Hedrick*, (Tex.) 47 S. W. Rep. 71.

nor, of course, for any further stock payments. It has, indeed, been said that he becomes a mere creditor of the association,⁴⁵ unaffected by any rules or resolutions adopted after his notice is given.⁴⁶ But this doctrine cannot be supported. He does not, in any proper sense, cease to be a member, or become a creditor, until the period of his notice has expired.⁴⁷ He remains a member within the meaning of a rule requiring arbitration of disputes between the society and its members,⁴⁸ and for the purpose of ascertaining the statutory majority necessary for dissolution,⁴⁹ and affected by rules and resolutions, adopted by the society though touching the very right he is seeking to exercise, so long as they are not destructive of the same.⁵⁰ Nor does he ever, by reason of his rights as a withdrawing member, become a creditor of the society like its general or outside creditors,⁵¹ and the fact that he holds an order upon the society's treasurer for payment of his demand does not entitle him to rank as such a creditor.⁵² This, however, is true, that, on expiration of the stipulated period of notice, and in the absence of any statute, charter or by-law provisions to the contrary, he may sue the association⁵³ for the amount due him.⁵⁴ But an averment of losses sustained before plaintiff's

⁴⁵ U. S. B. & L. Asso. v. Silverman, *supra*.

⁴⁶ Armitage v. Walker, 2 Kay & J. 211.

⁴⁷ Synnott v. Iron Belt B. & L. Asso., 89 Fed. Rep. 292. And see Lepore v. Twin Cities Nat. B. & L. Asso., 5 Pa. Super. Ct. 276, 279.

⁴⁸ Walker v. General &c. B. Soc., 36 Ch. D. 777.

⁴⁹ Sibun v. Pearce, (C. A.) 44 Ch. D. 354.

⁵⁰ Pepe v. City & Suburb. P. B. Soc., [1893] 2 Ch. 311; Kemp v. Wright, [1894] 2 Ch. 462; Englehardt v. Fifth Ward Perm. D. S. & L. Asso., 148 N. Y. 281; 42 N. E. Rep. 710 (reversing 25 N. Y. Supp. 835); Hawley v. North Side B. & L. Asso., (Colo.) 52 Pac. Rep. 408. But compare Holyoke B. & L. Asso. v. Lewis, 1 Colo. App. 127; 27 Pac. Rep. 872; McKenney v. Diamond State L. Asso., 8 Houst. (Del.) 577; 18 Atl. Rep. 905.

⁵¹ Christian's App., 102 Pa. St. 184, 188; In re Blackburn & Distr. Benef. B. Soc., 48 (C. A.) L. T. Rep. (N. S.) 134. And see Gibson v. Safety Homest. & L. Asso., 170 Ill. 34; 48 N.

E. Rep. 580; Rabbitt v. Wilcoxon, 103 Iowa, 35; 72 N. W. Rep. 306; *infra*, § 8793.

⁵² Heggie v. B. & L. Asso., 107 N. C. 581; 12 S. E. Rep. 275. But where one sued as a withdrawing member and the association, in its defense, denied his membership, a decree in his favor, it seems, to be held, will make him a creditor of the society for the amount found due to him: *Prairie State B. & L. Asso. v. Nubling*, 170 Ill. 240; 48 N. E. Rep. 1016.

⁵³ The principle obtaining in all corporations, that a stockholder cannot, *qua* stockholder, sue at law for the value of his paid-up stock, applies in building associations: *O'Rourke v. West Pa. L. & B. Asso.*, 93 Pa. St. 308. That value, as has been seen, can be ascertained only upon and after complete winding up, i. e., after the final meeting to make division: *Britton v. American B. & L. Asso.*, 12 Phila. (Pa.) 430. He must either wait until that period and then get the full value of his shares, or take their withdrawal value by withdrawing.

⁵⁴ U. S. B. & L. Asso. v. Silverman,

withdrawal will delay judgment until the amount justly due may be ascertained.⁵⁵ The same right of suit that belongs to the withdrawing member belongs to his assignee of balances due him,⁵⁶ and the same defenses are available against him. Where, however, there is, in the governing statute, charter or by-law provision, a restriction upon the unqualified right to demand present payment on the maturity of the withdrawal notice,—such as a limitation upon the proportion of the corporate funds applicable to demands of that class, the weight of authority is to the effect that no suit can be successfully maintained against the society when its finances are not in the condition contemplated by such provisions.⁵⁷ Even where that doctrine is not recognized,⁵⁸ execution

85 Pa. St. 394; *O'Rourke v. West Pa. L. & B. Asso.*, 93 id. 308; *Laurel Run B. Asso. v. Sperring*, 106 id. 334; *Lepore v. Twin Cities Nat. B. & L. Asso.*, 5 Pa. Super. Ct. 276; *Wetherwulgh v. Knickerbocker B. Asso.*, 2 Bosw. (N. Y.) 381; *Southern B. & L. Asso. v. Price*, (Md.) 41 Atl. Rep. 53 (though a receiver may have been appointed in the meanwhile and taken charge of the association, so that performance of the contract by the association has become impossible); *Prairie State L. & B. Asso. v. Gorrie*, 167 Ill. 414; 47 N. E. Rep. 739 (where it was held that assumption would lie for the withdrawal value of shares in a more valuable series, which plaintiff had understood he was subscribing for, whilst the society contended that his subscription was for shares in a less valuable series). But the order on the treasurer given to a withdrawing member is not an "instrument for the payment of money;" *Newlin v. Milton B. & L. Asso.*, 9 W. N. (Pa.) 220, nor a bill of exchange or negotiable: *Ashland Bank'g Co. v. Centralia Mut. L. F. Asso.*, 9 Luz. Leg. (Pa.) 41. See also *Christian's App.*, 102 Pa. St. 188, 189.

⁵⁵ *Wittman v. Build'g Asso.*, 7 W. N. (Pa. St.) 80 (but not an indefinite allegation of loss); *U. S. B. & L. Asso. v. Silverman*, 85 Pa. St. 394; nor, according to *Dennison v. Alpena L. & B. Asso.*, (Mich.) 75 N. W. Rep. 300, an allegation of losses by paying out withdrawals on erroneous reports as to the standing of the association, made by

an auditing committee of which plaintiff was a member (though he was not a director) caused by the failure to discover defalcations by the secretary. And, unless expressly provided for, no interest is allowable: *Endl. B. A.*, § 119; *Re Sunderland, etc.*, B. Soc., 24 Q. B. D. 394. 405-406.

⁵⁶ *Henninghausen & Wolff v. Fischer*, 50 Md. 583.

⁵⁷ *Heinbokel v. Nat. S., L. & B. Asso.*, 58 Minn. 340; 59 N. W. Rep. 1050; *Texas Homest. B. & L. Asso. v. Kear*, (Tex.) 13 S. W. Rep. 1020; *Englehardt v. Fifth Ward Perm. D. S. & L. Asso.*, 148 N. Y. 281; 42 N. E. Rep. 710; *Pawlick v. Homest. L. Asso.*, 37 N. Y. Supp. 164; *Rabbitt v. Wilcoxon*, 103 Iowa, 35; 72 N. W. Rep. 306; *Brett v. Monarch Investm. B. Soc.*, [1894], Q. B. 367 (C. A.). The above case, at least in part, seem to indicate that it is the plaintiff's duty to aver and prove the sufficiency of available assets to meet his demand. But in *St. Louis Loan & Investm. Co. v. Yantis*, 173 Ill. 321; 50 N. E. Rep. 807, it is said that he need not do so, the want of sufficient funds being matter of defense on the part of the society. Where the society defends on the basis of a denial of plaintiff's membership, and he recovers against it, it is held that a statutory provision that only half the funds in the treasury shall be applicable to withdrawals cannot be invoked by the society: *Prairie State B. & L. Asso. v. Nubling*, 170 Ill. 240; 48 N. E. Rep. 1016.

⁵⁸ See *U. S. B. & L. Asso. v. Silver-*

upon the judgment obtained will be stayed for a reasonable time to enable the society to collect the necessary funds in the regular way.⁵⁹ But, of course, in any case, the want of funds relied upon by the society must be a *bona fide* one in order to avail it.⁶⁰ In the funds available for withdrawal demands, are not to be included funds invested in and represented by loans made to members and repayable as building associations' loans are repayable.⁶¹

§ 8733. **Limitations upon Right of Withdrawal.**—From the effects noted as resulting from a withdrawal, there flows an obvious limitation upon the right of withdrawal; viz., it can be exercised only during the active life of the association or series to which the member belongs. It cannot be exercised when the stock has matured and the association or series exists only for the purposes of liquidation,⁶² nor when the society has become insolvent or its business has ceased and the process of winding up begun.⁶³ When those periods have been reached,⁶⁴ all the stockholders, or any of them, are entitled to is an equal division of the assets, less expenses and losses, and no one of them can acquire an advantage over the rest by changing, through the formality of withdrawal, his relation from that of a member, with equal rights and burdens, to that of a mere creditor.⁶⁵ This principle, however, leaves unaffected *bona fide* settlements with or payments to withdrawing members already

man, 85 Pa. St. 394, with which, however, compare *Toram v. Howard Benefic. Assn.*, 4 id. 519.

⁵⁹ *U. S. B. & L. Assn. v. Silverman*, *supra*. Such a provision is said to have no bearing upon the right of a withdrawing member to enforce a mortgage assigned to him by the association as collateral for the payment of an order given him for the amount due him: *Quein v. Smith*, 108 Pa. St. 325.

⁶⁰ *Englehardt v. Fifth Ward Perm. D. S. & L. Assn.*, *supra*.

⁶¹ *State v. Redwood Falls B. & L. Assn.*, 45 Minn. 154,—though “available balance” has been held to mean, not merely money in the treasury, but such assets as the society could realize without undue loss or delay: *Brett v. Monarch Investm. B. Soc.*, *supra*. See *Endl., B. A.*, §§ 112–116.

⁶² *Laurel Run B. Assn. v. Sperring*, 106 Pa. St. 334.

⁶³ *Ibid.*; *Christian's App.*, 102 Pa.

St. 184; *Hanney v. Build'g Assn.*, 16 W. N. (Pa.) 450; *Rabbitt v. Wilcoxon*, 103 Iowa, 35; 72 N. W. Rep. 306; *In re Sunderland & C. B. Soc.*, 24 Q. B. D. 394; *Kemp v. Wright*, [1894] 2 Ch. 462. But see *Walton v. Edge*, 10 App. Cas. 33; *Barnard v. Tomson*, [1894] 1 Ch. 374.

⁶⁴ Whether an investing member may withdraw so as to obtain priority over other members does not, it is said, depend upon the answer to be given to the question whether the society was solvent or insolvent when his notice matured, or whether the members or officers of the society knew then that it was insolvent: the line is to be drawn at the time when there is a stoppage of the society's business, or a recognition, by those who are entitled to form a judgment, that the business must be stopped: *In re Ambition Investm. B. Soc'y*, [1896] 1 Ch. 89.

⁶⁵ *Endl., B. A.*, § 108

made,⁶⁶ as well as the rule that withdrawing members are not to be subjected to contribution to losses by reason of causes arising after notice of withdrawal.⁶⁷

§ 8734. **Right of Withdrawal Restricted to Unadvanced Members.**— Again, the right of withdrawal, properly so called, belongs only to unadvanced members. The essential elements of the contract between a building association and its borrower, as they will be hereafter more fully elucidated,⁶⁸ destroy, or, perhaps more accurately, suspend that right.⁶⁹ Corresponding, however, with the investing member's right to withdraw is the borrowing member's right of voluntary repayment,⁷⁰ a subject which will be more conveniently discussed in connection with the principles applicable to building association loans.⁷¹

§ 8735. **Effect of Withdrawal upon the Status of Borrowing Members.**— Apart from this disability (except where the transaction of loan is regarded as a surrender of the stock to the association and a consequent extinguishment of membership),⁷² the status of a borrower⁷³ as a member remains unchanged.⁷⁴ In other words, he

⁶⁶ *Re Sheffield &c. B. Soc.*, 22 Q. B. D. 470. And see *Booz's App.*, 109 r.a. St. 592; *Wangerien v. Aspell*, 42 Ohio St. 655; 24 N. E. Rep. 405; *Miller v. Jefferson B. A.*, 50 Pa. St. 32.

⁶⁷ *Christian's App.*, 102 Pa. St. 184; *Brown v. Sanders*, 20 D. C. 455; *McKenney v. Diamond State L. Asso.*, 8 Houst. (Del.) 577; 18 Atl. Rep. 905.

⁶⁸ *Infra*, §§ 8772-8774.

⁶⁹ *Endl.*, B. A., §§ 121-127; *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 514; *Laurel Run B. Asso. v. Sperring*, 106 id. 334; *State v. Redwood Falls B. & L. Asso.*, 45 Minn. 154,— especially where his stock is pledged to the society as security and the by-laws forbid the withdrawal of members whose stock is thus hypothecated: *Anderson B. &c. Asso. v. Thompson*, 88 Ind. 405; *State v. Redwood Falls B. & L. Asso.*, *supra*; *Wadlinger v. German B. & L. Asso.*, 153 Pa. St. 622. A statutory prohibition against withdrawals while stock is pledged is in *Dennison v. Alpena L. & B. Asso.*, (Mich.) 75 N. W. Rep. 300, said to apply only where the

holder has borrowed from the society and pledged his stock, not where installments simply remain unpaid.

⁷⁰ See *Endl.*, B. A., §§ 130-146. Under a by-law permitting a borrower to repay on thirty days' notice and withdraw after ninety days' repayment was held not to be a condition precedent to withdrawal, but both might be executed and demanded by one and the same transaction: *Southern B. & L. Asso. v. Harris*, 98 Ky. 41; 32 S. W. Rep. 261.

⁷¹ *Infra*, § 8784.

⁷² *Infra*, § 8773.

⁷³ A member is a member who receives, in advance, the par value of his shares, and agrees, in consideration thereof, to pay dues and interest until the dues paid and dividends declared and not paid (i. e., undivided earnings) equal the par value of the shares, when he ceases to be a member and is entitled to cancellation of his mortgage: *Eversmann v. Schmitt*, 53 Ohio St. 174; 41 N. E. Rep. 139.

⁷⁴ *Ante*, §§ 8716, 8717; *Endl.*, B. A., §§ 122-123.

continues to be a member, with all the rights of membership.⁷⁵ As he continues liable to pay his periodical installments,⁷⁶ so he retains his right to vote, act as a director or other officer, and in fact do every act which a stockholder may do, except transfer his title to his shares: and even that he may do⁷⁷ subject to the lien of the association.⁷⁸

§ 8736. **Rights upon Maturity of Stock.**—On the maturity of the stock of a building association or of a series therein it is the right of investing members to be paid the par value of the shares held by them, in full, in cash and with reasonable promptness, according to the governing statute, charter or by-law provision.⁷⁹ They cannot, by a rule adopted thereafter by the directors, be compelled to compete among themselves for preference of payment.⁸⁰ Nor can they be required to accept payment in mortgages of a later series or any other securities in lieu of cash;⁸¹ nor to submit to a postponement of the closing, for a further advance in the society's real estate, payment of dues in the meanwhile to go on.⁸² And under a valid by-law limiting the amount payable on matured stock in any series to one-half of the corporate revenues, with priority to those allowing the highest premiums for present payment, the competition for payment of stock in one matured series cannot

⁷⁵ That is to say, he remains the owner of his shares (see next note). But where one, who has pledged his stock to the society to secure a loan, took no steps to contest the validity of a sale of it for taxes, for five years, he cannot thereafter charge the society with liability therefor: *McNeal v. Mech. B. & L. Asso.*, 40 N. J. Eq. 351.

⁷⁶ *Ante*, § 8717.

⁷⁷ Not in Michigan: *Mich. B. & S. Asso. v. McDevitt*, 43 N. W. Rep. 760. The borrower, or as he is there termed, the "seller," remains a member, but his stock is extinguished by the "sale" to the corporation, i. e., the loan: *Ibid.*

⁷⁸ *Mechanics' B. & L. Asso. v. Conover*, 14 N. J. Eq. 219 (not disturbed in this particular by 17 id. 497); *Lester v. Log Cabin B. Asso.*, 38 Md. 115; *North America B. A. v. Sutton*, 35 Pa. St. 463; *Early & Lane's App.*, 89 id. 411; *Hagerman v. Ohio B. & L. Asso.*, 25 Ohio St. 186; *Parker v. Fulton L.*

& B. Asso., 46 Ga. 166; *Pattison v. Albany B. & L. Asso.*, 63 id. 373; *Cit. Mut. L. & A. F. Asso. v. Webster*, 25 Barb. (N. Y.) 263; *Hekelukaemper v. German B. & S. Asso.*, 22 Kan. 540; *Lincoln B. & S. Asso. v. Graham*, 7 Neb. 173; *Herbert v. Kenton B. & L. Asso.*, 11 Bush (Ky) 296. But see *Overby v. Fayetteville B. & L. Asso.*, 81 N. C. 56; *Hoskins v. Mech. B. & L. Asso.*, 84 id. 838; *White v. Mech. B. Asso.*, 22 Gratt. (Va.) 223; *Bowker v. Mill River L. F. Asso.*, 7 Allen (Mass.) 100; *Wilson v. Miles Plating B. Soc.*, 22 Q. B. D. 381; *Rosenburg v. Northumberland B. Soc.*, id. 373; *Bradbury v. Wild*, [1893] 1 Ch. 377.

⁷⁹ *Endl., B. A.*, § 117.

⁸⁰ *Mechanics' &c. Association's App.*, (Pa.) 7 Atl. Rep. 728; 6 Centr. Rep. 580.

⁸¹ *Mercer v. Ambler B. & L. Asso.*, 10 Pa. C. C. Rep. 51; 20 Phila. 351.

⁸² *Burns v. Metropol. B. Asso.*, 2 Mackay (D. C.) 7.

be extended to holders of stock in a later one which has also matured.⁸³ Borrowing members, on the other hand, are entitled, as soon as the stock has reached maturity, to stop payments thereon at once and to have their securities canceled and surrendered within a reasonable time.⁸⁴ And this right, belonging to borrowing members in one series, cannot be defeated by the active non-borrowers in all the series.⁸⁵

⁸³ Deering v. Bishop Bailey B. & L. Asso., (N. J.) 24 Atl. Rep. 575.

⁸⁴ Endl., B. A., §§ 155-156; Tyrrell L. & B. Asso. v. Haley, 139 Pa. St. 476; 20 Atl. Rep. 1063; Same v. Same, 163 id. 301. They may enforce this right by bill in equity or mandamus, and the society can have no judgment against them or their obligations: 139 Pa. St. 476.

⁸⁵ Sullivan v. Jackson B. & L. Asso., 70 Miss. 94; 12 South. Rep. 590; 7 Am.

R. & C. Rep. 115. But an improvident satisfaction of borrowers' mortgages by order of the directors acting upon a mistaken belief in the maturity of the stock, may be stricken off on bill in equity by the assignee of the society for benefit of creditors: Callahan's App. 124 Pa. St. 138; 16 Atl. Rep. 638. As to the right of members to apply to courts for winding up of the society's affairs on maturity of its stock, see *infra*, § 8794.

CHAPTER CCXXXIX.

OFFICERS AND DIRECTORS.

SECTION

8739. Officers of building associations.

8740. The usual officers of these associations.

8741. President, treasurer, secretary, solicitor.

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SECTION

8744. Obligations of directors as fiduciaries.

8745. Bonds of officers and liability of their sureties.

8746. Liability of officers to fines, amotion, prosecution.

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§ 8739. **Officers of Building Associations.**— The management of the affairs of a building association is practically entirely in the hands of its officers,¹ who, deriving their powers primarily from the corporate meeting, and possibly appealing to it in difficult and momentous cases,² yet virtually constitute the government of the association.³

§ 8740. **The Usual Officers of these Associations.**— The usual officers in building associations are (1) president and vice-president, (2) treasurer, (3) secretary, (4) board of directors. To these may be added the now generally discarded office of trustees, whose functions were principally to hold title for the association of its real estate, and of all real estate conveyed to secure debts due the association, and to convey and release the same by order of the board of directors, as might be required by the constitution and by-laws;⁴ and auditors, whose duty it is annually or more frequently to audit the accounts of the secretary and treasurer and inspect the

¹ The validity of their election will not be inquired into collaterally: *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428.

² The corporate meeting acts by its majority: *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186.

³ See *Endl., B. A.*, §§ 157-169.

⁴ *Endl., B. A.*, § 195. Corporate funds invested for the society in the names of trustees are not trust funds within the meaning of the English Trust Investment Act of 1889: *Re Nat'l Permanent Mut. B. B. Soc'y, L. R.* 43 Ch. Div. 431.

mortgage and other securities held by the society;⁵ and, in well organized and carefully managed associations, a solicitor, and in some a surveyor, whose functions respectively are to examine the titles and value of properties offered as security and report thereon to the directors.⁶

§ 8741. **President, Treasurer, Secretary, Solicitor.**—The duties of the president, or, in his absence, the vice-president,⁷ and treasurer⁸ do not differ from those of the corresponding officers in other corporations.⁹ The secretary's business is, generally, to conduct the correspondence of the society, attest the president's signature when required, keep the financial accounts of the association and correct minutes of its proceedings, as well as of those of the board of directors,¹⁰ summon meetings of the directors and the society, make sales and transfers of stock,¹¹ furnish, at all times, any information concerning the corporate affairs that

⁵ Id., § 31. As to the effect of settlements by auditors, see *Holgate v. Shutt*, L. R. 27 Ch. Div. 111; *Love v. Build. & L. Asso.*, 11 W. N. (Pa.) 303.

⁶ See *Davis*, B. A., pp. 124-129; *Endl.*, B. A., § 214, note, pp. 232-233.

⁷ The president's contracts with third persons for necessities to be furnished the association are, in general, binding upon it, unless there be a resolution upon the corporate books forbidding him to enter into such a contract: *Westervelt v. Radde*, 55 How. Pr. (N. Y.) 369.

⁸ As to his claims to protection for payments made by him on authority of the directors, see *Grimes v. Harrison*, 26 Beav. 435; *In re Kent B. Build. Soc.*, 1 Dr. & L. 417. Where he is also a director, warrants drawn to him by virtue of a resolution of the directors, to repay him for dues of members advanced by him and credited to him in his account, are valid when ratified by the stockholders, such ratification being inferable from their adoption, at a stated meeting, of an annual report to the society, containing a report of the treasurer wherein the use of the warrants is set out: *Harmony B. Asso. v. Goldbeck*, 13 W. N. (Pa.) 24; and he is also entitled to be reimbursed as a general creditor of an insolvent building association for moneys which he has paid on orders

drawn upon him before the assignment and for which the assignee has refused him credit in the settlement of his account as treasurer: *Christian's App.*, 102 Pa. St. 184. But he has no right to take anything but cash in payment of dues and fines, even in the presence and with the acquiescence of the executive officers, and he and his bondsmen are liable for any loss thus occurring: *People's B. & L. Asso. v. Wroth*, 43 N. J. L. 70; *Mut. B. & L. Asso. v. Hammell*, ib. 78; *Mueller v. Cohen*, 27 Ohio L. J. 353. And he is liable for misappropriation of the corporate money by his clerk to whom he intrusts it: *Re Mut. & Perm. Benefit Soc.*, 48 J. P. 54. Moneys received by the treasurer do not become his, but remain the property of the society, in his hands as bailee: *Mowbray v. Antrim*, 123 Ind. 24; 23 N. E. Rep. 858; and he is not liable for losses without his negligence: *Ibid.*; *Hibernia B. Asso. v. McGrath*, 154 Pa. St. 296; 26 Atl. Rep. 377.

⁹ See *Endl.*, B. A., §§ 171-173.

¹⁰ He may be held responsible in case of consequential damages to the association for violation of this duty: *Priestly v. Hopwood*, 10 L. T. Rep. (N. S.) 646; 12 W. R. 1031.

¹¹ *Prairie State L. & B. Asso. v. Gorrie*, 167 Ill. 414; 47 N. E. Rep. 739.

may be necessary, and receive (unless there be other provision therefor), notices of withdrawal.¹² He is the mouthpiece, and practically a general agent of the association, and often, in point of fact, he is the manager of its entire business.¹³ When such is the case, the society will be bound by orders given by him, for necessary repairs;¹⁴ by his representations to one, induced thereby to become surety on a promissory note given to the association, that he should be liable only until an insurance could be placed on the maker's house;¹⁵ by his contract with a borrower to insure the property mortgaged to the society;¹⁶ by his acceptance of a notice of withdrawal, not in the form required by the rules¹⁷ and by his representation to one about to purchase stock that it belongs to a certain series.¹⁸ But a mere expression of opinion, e. g., a statement as to how many payments would have to be made in order to extinguish an obligation given to the society, would, of course, not bind the latter.¹⁹ Nor, where the rules require the payment of dues at regular stated meetings, will it be concluded by payments made to the secretary at other times and embezzled by him,²⁰ or by the acceptance of payments that ought to have been made to the treasurer.²¹ And he cannot bind the society, against its will, by his single-handed acts,²² where they are

¹² Reynolds v. N. Y. Bldg. Loan Bank'g Co., 35 N. Y. Supp. 80.

¹³ Endl., B. A., § 174.

¹⁴ Allard v. Bourne, 15 C. B. (N. S.) (109 Engl. C. L. Rep.) 468.

¹⁵ Jones v. Nat. B. Asso., 94 Pa. St. 215. Compare Gass v. Cit. B. & L. Asso., 95 id. 101; Selden v. Reliable S. & B. Asso., 32 Sm. (Pa.) 336.

¹⁶ Chicago B. Soc. v. Crowell, 65 Ill. 453.

¹⁷ McKenney v. Diamond State L. Asso., 8 Houst. (Del.) 557; 18 Atl. Rep. 905; Reynolds v. N. Y. Bldg. Loan Bank'g Co., 35 N. Y. Supp. 80.

¹⁸ Prairie State L. & B. Asso. v. Gorrie, 167 Ill. 414; 47 N. E. Rep. 739; so that the purchaser can hold the society accordingly, though the transfer actually made to him was of stock in a less valuable series: *ibid*.

¹⁹ Hammerslough v. B., L. & C. Asso., 79 Mo. 80; Lake v. Security L. Asso. 72 Ala. 207. Nor his declarations as to the amount due upon a mortgage, in the absence of proof of authority: Johnston v. Elizabeth B. & L. Asso.,

104 Pa. St. 394. But in Fulton B. & L. Asso. v. Greenlea, (Ga.) 29 S. E. Rep. 932, holding the society bound by the secretary's statement to a purchaser of property subject to a mortgage held by the society, that only so and so and so much was due on it.

²⁰ Morrow v. James, 4 Mackey (D. C.) 59: unless he was simply followed an established custom of the society: Haverson v. Cole, 6 W. R. 17. And see as to payments made to secretary which were held binding upon the association: Prairie State B. & L. Asso. v. Nubling, 170 Ill. 240; 48 N. E. Rep. 1016; and *ante*, § 8717.

²¹ Van Wagenen v. Genesee Falls Perm. S. & L. Asso., 34 N. Y. Supp. 491; Browne v. Sanders, 20 D. C. 455, except as against one estopped from disputing their validity.

²² But if the society ratifies them, e. g., his acquiescence of a note by a member to the secretary in settlement of arrearages, it cannot afterwards deny his authority to make a contract for extension of time of payment:

either *ultra vires* of the association, or clearly such as require the consent of the board of directors.²³ The solicitor²⁴ is an agent of the society only within the limited scope of his powers. He cannot delegate to another, so as to bind the society, the duty of procuring searches of title,²⁵ nor can he bind it by placing on record a mortgage rejected by the directors,²⁶ or canceling a mortgage without their authority.²⁷ But his delay in presenting for payment a check intrusted to him by direction of the secretary will make the loss consequent upon its becoming worthless fall upon the society.²⁸

§ 8742. Status and Powers of Directors.—The board of directors constitutes, in a manner, the managing committee of the association.²⁹ Elected by the members at the general corporate meeting, they have power to bind the association by their acts falling within the authority conferred upon them by statute or charter.³⁰ Their executory engagements *ultra vires* of the association, whilst not enforceable against the latter without its consent,³¹ may render them liable as upon an implied warranty that the society had the power to do what they assumed to do in its name.³² And, in such case, there is no obligation upon the members of the association to indemnify the transgressors.³³ In the exercise of the powers conferred upon them, they are subject to the control of the corporate meeting, but not to the interference of individual members, except in so far that, if the directors act illegally, proceedings in equity may be taken against them by individual members representing the whole.³⁴ They are to exer-

Drescher v. Fulham, (Colo.) 52 Pac. Rep. 685.

²³ See Endl., B. A., §§ 174, 231–232. The secretary has been held not liable for the amount of a note delivered by him to the president for safe-keeping and collection, where, without his fault, it is obtained by the maker without payment: Mowbray v. Antrin, 123 Ind. 24; 23 N. E. Rep. 858.

²⁴ See Endl., B. A., §§ 196–198.

²⁵ Peabody B. & L. Asso. v. Houseman, 89 Pa. St. 261.

²⁶ Conway v. Log Cabin B. Asso., 52 Md. 137.

²⁷ Tradesmen's B. & L. Asso. v. Thompson, 31 N. J. Eq. 536; 32 id. 133.

²⁸ Kilpatrick v. Home B. & L. Asso., 119 Pa. St. 30.

²⁹ Directors are "officers" of the society only in a modified sense, and not within the meaning of a statutory provision requiring the "officers" to subscribe the articles of association: Second Manhattan B. Asso. v. Hayes, 4 Abb. App. Dec. (N. Y.) 183.

³⁰ Endl., B. A., §§ 176–178.

³¹ Acts simply in excess of their own powers are capable of ratification by the corporate meeting: Harmony B. Asso. v. Goldbeck, 13 W. N. (Pa.) 24.

³² Richardson v. Williamson, L. R. 6 Q. B. 276.

³³ In re Kent Ben. B. Soc., 1 Dr. & S. 417.

³⁴ Endl., B. A., §§ 176, 189–194; Reg. v. D'Eyncourt, 4 Best & S. (116 Engl. C. L. Rep.) 820; Grimes v. Harrison, 26 Beav. 435; Sperring's App.,

cise their powers sitting as a board, regularly convened,³⁵ a majority ordinarily constituting a quorum, except where the statute or charter requires the concurrence of a greater number.³⁶ Nor can they delegate to others, or to a smaller number than the whole board, any of the powers thus vested in them, whose exercise involves personal judgment and discretion.³⁷ Their transactions should be entered in a minute book belonging to the society and properly attested.³⁸ They cannot enter into any secret arrangement for their personal benefit;³⁹ nor, knowing the society to be insolvent, discharge their indebtedness to it by relinquishing to it their stockholdings,⁴⁰ or even without such knowledge, escape liability for a proportionate share of the common losses by can-

71 Pa. St. 11; *Maisch v. Seamen's S. F. Soc.*, 5 Phila. (Pa.) 30; *Leffman v. Flanigan*, Ib., 155, 419; *Thompson v. Planet Ben. B. Soc.*, L. R. 15 Eq. 333. Thus, stockholders (though their shares be pledged to the society as collateral) may maintain a bill to restrain the directors from closing out a series before its maturity, and from releasing securities of borrowers: *Fisher v. Paton*, 134 Ma. 32; 34 S. W. Rep. 1096. Directors have no power to make an assignment for benefit of the association's creditors, without authority from the stockholders, where the association is not in fact insolvent: *Powers v. Blue Grass B. & L. Asso.*, 86 Fed. Rep. 705; nor to charge off a deficit in the corporate assets against the stock of members so as to render the society solvent, where such deficit was created by expenditures made in violation of its articles: *People v. Empire L. & Inv. Co.*, 44 N. Y. Supp. 308; and where they agree with parties about to be elected directors, that if the preferred stock fund should be found impaired, they, the old directors, would make it intact, and there was found to be a deficit, which was accordingly made up by one of the old directors, plaintiff, it was held he could not recover the amount paid by him where its repayment would again impair the fund: *Tate v. Louisville B. & L. Asso.*, (Ky.) 44 S. W. Rep. 953. But they have power to reimburse the treasurer for dues of members advanced by him and credited in his account: *Harmony B. Asso. v.*

Goldbeck, 13 W. N. (Pa.) 24; and have always a reasonable discretion to remit and condone fines. *People v. Lowe*, 117 N. Y. 175; 22 N. E. Rep. 1016; *Endl.*, B. A., § 432.

³⁵ *Endl.*, B. A., §§ 179, 180.

³⁶ See *Endl.*, B. A., §§ 180-182; *Card v. Carr*, 1 C. B. (N. S.) 187 *Engl. C. L. Rep.* 197).

³⁷ *Endl.*, B. A., § 183. But the establishment of committees of their own number with special care of particular branches of the general business, for the purpose of expediting and systematizing the whole work, is not such objectionable delegation of powers: *ibid.*

³⁸ Whilst such record is not essential to the validity of their acts and contracts, either in favor or against the association, the taker being allowed to supply an omission in, though not to contradict, the minutes: *Harmony B. A. v. Goldbeck*, 13 W. N. (Pa.) 24, it is evidence of all relations between the corporation and the corporators: *Bank of Commerce's App.*, 73 Pa. 59; *German Un. B. & S. A. v. Sendmeyer*, 50 id. 67; *Dobinson v. Hawks*, 16 Sim. 407, 39 *Eng. Ch. Rep.* 406. If there be no minutes, or upon failure of the corporation to produce them on notice, other evidence of corporate action is competent: *Heintzelman v. Druids Relief Ass'n*, 38 Minn. 138, 36 N. W. Rep. 100.

³⁹ *Pangborn v. Citizens' &c. Ass'n*, 35 N. J. Eq. 341.

⁴⁰ *Quein v. Smith*, 108 Pa. 325; and this rule extends to other officers: *ibid.*

celing their mortgages on the supposition that stock, which, in fact, was far from maturity, had matured.⁴¹

§ 8743. **Liabilities of Directors.**— Except in a very general sense, directors are not trustees as to the stockholders, but only mandataries bound to apply ordinary skill and diligence.⁴² They are personally liable therefore, for losses sustained by the association as the direct and actual⁴³ result⁴⁴ of their breach of the law of the society, of their actual fraud, or of their gross negligence amounting to legal fraud.⁴⁵ But they are not to be treated as insurers of the corporate interests,⁴⁶ nor held liable for errors and mistakes of judgment, even so glaring as to appear absurd and ridiculous, so long as they are honest and fairly within the scope of the powers and discretion confided to them.⁴⁷ Hence, a director of a building association, long insolvent by reason of the declaring of dividends out of the capital, with his knowledge and participation, and partly with money advanced by him to it for the purpose, is postponed, on a distribution of its assets, until the stockholders, whether they became such before or after the de-

⁴¹ Callahan's App., 124 Pa. 138, 16 Atl. Rep. 638. A director may, however, become a party to a contract with the society, and as to such contract, stand as a stranger to the society: *Stratton v. Allen*, 16 N. J. Eq. 229. The president and two directors constituting a quorum, a sale to the president by such quorum of land belonging to the corporation was sustained, in *Buell v. Buckingham & Co.*, 16 Ia. 284. But it seems, a director is disqualified to vote on a resolution in which he is personally interested: *Smith v. Los Angeles I. & L. Co-op. Ass'n*, 78 Cal. 289.

⁴² *Spering's App.*, 71 Pa. 11; *Sullivan v. Lewiston Institution for Sav.*, 56 Me. 507; *Mowbray v. Antrim*, 123 Ind. 24, 23 N. E. Rep. 858; and since a director may become treasurer of the society, if he does so without salary, his office as treasurer will not change his liability as a gratuitous bailee: *Hibernia B. A. v. McGrath*, 154 Pa. 296, 26 Atl. Rep. 377. See *Second Manhattan B. A. v. Hayes*, 4 Abb. App. Dec. (N. Y.) 183, that, in a strict sense, directors are not "officers."

⁴³ Not merely anticipated: *Bloom v. Nat. United Ben. S. & L. Co.*, 152 N. Y. 114; 46 N. E. Rep. 166.

⁴⁴ That the mere consent of one director to the passage of a resolution authorizing an illegal act, which act was thereafter done by the remaining directors in the absence of the one referred to, is not the direct, but the remote cause of the ensuing loss, see *Cullerne v. London & C. Ben. Soc. (C. A.)* 25 Q. B. D. 485; 29 W. R. 88; *Build. & L. News*, Feb., 1891. The absence of a director who never took his seat in the board nor participated in its transactions, and against whom there is no allegation of knowledge of the frauds complained of, but merely of the fact of his election, exonerates him: *Maisch v. Seamen's S. F. Soc.*, 5 Phila. (Pa.) 30; *Leffman v. Fanigan*, Ib. 155, 419. Compare *Percy v. Mil-laudon*, 3 La. 568, 575; *Cross v. Fisher (C. A.)* [1892], 1 Q. B. 467.

⁴⁵ *Endl., B. A.*, §§ 189-193; *Build. & L. News*, June, 1889.

⁴⁶ *Bloom v. Nat. United Ben. S. & L. Co.*, 152 N. Y. 114; 46 N. E. Rep. 166.

⁴⁷ *Spering's App.*, *supra*.

claring of the fraudulent dividends, are fully paid.⁴⁸ Again, where the directors, in excess of their and the association's powers, borrowed money in its name, themselves guaranteeing and being subsequently obliged to provide for its repayment, they were held not entitled to be reimbursed by the stockholders.⁴⁹ Any distinct waste or misapplication of the corporate funds by the directors will render them personally liable therefor,⁵⁰ and they become so for losses on loans made by them in violation of corporate by-laws, as where they grant loans upon personal security in excess of the limit fixed by the by-laws;⁵¹ or borrow money for the society in excess of the amount limited by by-law;⁵² but not for losses resulting to the society from honest mistakes in estimating the value of lands offered as security for legitimate loans,⁵³ nor from a defect in the acknowledgment of a mortgage which rendered it worthless.⁵⁴

§ 8744. **Obligations of Directors as Fiduciaries.**—A director may be a party to a contract with the association,⁵⁵ but cannot, through his superior opportunity for knowledge of its affairs, secure to himself an inequitable advantage over its members. Thus, knowing it to be insolvent and its stock to be in fact worth very much less than par, he will not be permitted to cancel his indebtedness to it by relinquishing to it his stock at its nominal value.⁵⁶ And even where the directors,

⁴⁸ Kisterbock's App., 51 Pa. St. 485.

⁴⁹ In re Kent Ben. B. Soc., 1 Dr. & Sm. 417. See also *Ex parte* Watson, 57 L. J. Q. B. D. 609.

⁵⁰ Citizens' L. Asso. v. Lyon, 29 N. J. Eq. 110.

⁵¹ Citizens' B., L. & S. Asso. v. Corriell, 34 N. J. Eq. 383. See, however, Cullerne v. London &c. Ben. B. Soc. (C. A.) 25 Q. B. D. 485; 29 W. R. 88, *supra*. And see also Sheffield &c. B. Soc. v. Aizlewood, L. R. 44 Ch. Div. 412, that directors of a building society having a large discretion invested in them as confidential agents, may properly make advances on classes of securities (e. g., of a speculative nature) forbidden to ordinary trustees; and that, having made a loan on second mortgage of a leasehold colliery, they may, after being obliged to pay his first, enter into possession of the property and pay out of the society's assets the rents reserved by the leases and the proper expenses of maintaining

and working the colliery, without rendering themselves liable for such expenditures.

⁵² Looker v. Wrigley, L. R. 9 Q. B. D. 397; Cross v. Fisher, [1892] 1 Q. B. 467.

⁵³ Cit. B., L. & S. Asso. v. Corriell, *supra*.

⁵⁴ *Ibid*.

⁵⁵ Endl., B. A., § 187. The knowledge which a director dealing with the society in a contract relation has of facts, which, if brought to the society's notice, would affect its rights as to third parties,—so, e. g., as to postpone its mortgage on his property to another which he had given on the same property to junior mortgagee,—will not be imputed to the society, where, in the transaction, he acted independently of the board and for himself individually: Merchantville B. & L. Asso. v. Zane, (N. J.) 38 Atl. Rep. 420.

⁵⁶ Quein v. Smith, 108 Pa. St. 325.

acting in good faith upon a fraudulent report of the secretary announcing the maturity of the shares, authorize the cancellation of a mortgage against one of their number upon surrender by him of his stock, which, in fact, was worth only half its supposed value, the cancellation was stricken off upon the application of the assignee, who was appointed when the frauds of the secretary and the consequent insolvency of the association became apparent.⁵⁷ Nor can a director enter into any secret arrangement for his benefit with his codirectors.⁵⁸

§ 8745. Bonds of Officers and Liability of their Sureties.—

Certain of the officers of building associations are by statute, charter or by-law required to give bond for faithful performance of their duties. The same rules applicable to such provisions as in other corporations, obtain also in these.⁵⁹ The officer, in procuring persons to become sureties upon his bond, is not to be regarded as the agent of the society to whom the bond is given.⁶⁰ The neglect of the executive officers of the association to hold (e. g.), the treasurer, to his duty to demand payment of dues, etc., in cash, will not discharge his sureties.⁶¹ The provisions of the by-laws concerning the duties of the officer enter into the contract of the sureties.⁶² But their liability is strictly confined to the terms of the bond. Thus, where an officer elected to fill a vacancy in an office which was annual, gave a bond with sureties, the latter's liability was restricted to the period for which he was originally elected, and did not cover delinquencies during his incumbency of the office by virtue of subsequent re-elections.⁶³ So, a bond stipulating for the good conduct of an officer holding office for a fixed time, and until "another officer be appointed," is exhausted upon the reappointment of the same officer.⁶⁴ But if the bond stipulates for liability for the misconduct of the officer "whether of the present term for which he has been elected, or of any succeeding terms to or for which he may be elected," or to that effect, the liability continues.⁶⁵

⁵⁷ Callahan's App., 124 Pa. St. 138; 16 Atl. Rep. 638.

⁵⁸ Pangborn v. Cit. & c. Asso., 35 N. J. Eq. 341.

⁵⁹ Endl., B. A., §§ 200-205.

⁶⁰ Metropolitan L. Asso. v. Eche, 75 Cal. 513; 17 Pac. Rep. 675.

⁶¹ People's B. & L. Asso. v. Wroth, 43 N. J. L. 70; Mut. B. & L. Asso. v. Hammell, ib. 78.

⁶² Humboldt S. & L. Soc. v. Wennerhold, 81 Cal. 528; 22 Pac. Rep. 920.

⁶³ Manuf. & Mech. S. & L. Co. v. Odd Fellows' Hall Asso., 48 Pa. St. 446.

⁶⁴ Cit. L. Asso. v. Nugent, 40 N. J. L. 215.

⁶⁵ People's B. & L. Asso. v. Wroth, *supra*; Mut. B. & L. Asso. v. Hammell, *supra*; Metropol. L. Asso. v. Esche,

§ 8746. Liability of Officers to Fines, Amotion, Prosecution.—

The liability of officers of building associations to fines and amotion,⁶⁶ and to criminal prosecutions in cases of gross breaches of trust, appropriation of the society's funds, conspiracy to defraud, etc.,⁶⁷ is no different from that of officers of other corporations.⁶⁸

§ 8747. Compensation of Officers.— The same may be said of the right of officers to compensation.⁶⁹ A director elected to serve without compensation cannot recover against the association for services rendered in that capacity, or for such as were incidental to his office, and a resolution passed by the corporation that he be paid a certain sum for services previously rendered by him as chairman of a committee is without consideration and imposes no obligation upon the corporation that can be enforced by action.⁷⁰ Whatever compensation an officer may be entitled to he can look for it only to the funds of the association, and cannot recover it from any individual member or director.⁷¹

57 Cal. 513; 17 Pac. Rep. 675; Humboldt Sa. § L. Soc. v. Wennerhold, 81 Cal. 528; 22 Pac. Rep. 920. And the term of the officer, if indefinite, does not necessarily coincide with that of the directors who appointed him: Ibid.

⁶⁶ Endl., B. A., § 206. It has been held that the stockholders cannot depose a board of directors and elect a new one: Powers v. Blue Grass B. & L. Asso., 86 Fed. Rep. 705. As to effect of such conflict, see *infra*, § 8792.

⁶⁷ Ib., §§ 207-208.

⁶⁸ On indictment of a secretary for embezzlement, the question whether or not the association was organized strictly in accordance and conformity with statutory requirements, is not a proper subject of inquiry: Shinn v. Comm'th, 32 Gratt. (Va.) 899.

⁶⁹ Endl., B. A., §§ 209-216.

⁷⁰ Loan Asso. v. Stonemetz, 29 Pa. St. 534.

⁷¹ Alexander v. Worman, 6 H. & N. 100.

CHAPTER CXL.

CORPORATE POWERS AND LIABILITIES.

SECTION	SECTION
8749. Corporate powers and liabilities.	8758. Acquisition of lands by these associations.
8750. Perpetual succession.	
8751. Common seal.	8759. Loaning money by these associations.
8752. How far bound by the acts of its agents.	8760. Trafficking in stock: compositions with its members.
8753. Contracts, how executed so as to bind principal.	8761. Different kinds of stock: dividends.
8754. Liability of association for frauds and torts of its agent.	8762. Actions by these associations: allegation of default.
8755. Contracts of building and loan associations.	8763. Averment of corporate capacity.
8756. Acts <i>ultra vires</i> of building and loan associations.	8764. Defenses to such actions.
8757. Borrowing powers of these associations.	

§ 8749. **Corporate Powers and Liabilities.**—Of the powers and liabilities common to all corporations—to have perpetual succession; to have and use a common seal; to contract, grant and receive and hold real estate, in the corporate name; to sue and be sued in like manner; to make by-laws,—it may be said that, whilst they apply, in general, to building associations, they are all subject to modifications and limitation by its charter of incorporation, and the statutes under which it is effected or which may be applicable to its provisions,¹ and even when in no degree restricted or curtailed,

¹ A labor statute will not apply to a previously organized building association, if, in case it did, the result would be a violation of the contract between it and its members: *Fisher v. Patton*, 134 Mo. 32; 34 S. W. Rep. 1096. Nor, where a statute makes its operation as to existing associations dependent upon their acceptance of it, will it apply to one not accepting it. *Home B. & L. Asso. v. Nolan*, (Mont.) 53 Pac. Rep. 738. In a charter granted under a general statute, any provision or power repugnant to such statute is void: *Becket v. Uniontown B. Asso.*, 88 Pa. St. 211; *Albright v. Lafayette B. & L. Asso.* 102 id. 411; *Crabtree v. Old Dominion B. & L. Asso.*, (Va.) 29 S. E. Rep. 741; *Laing v. Reed*, L. R. 5 Ch. App. 4; *Booz's App.*, 109 Pa. St. 592. The legislature may ratify charters previously granted, containing powers in excess of what the law as it stood at the time of incorporation warranted, with the effect of legalizing existing con-

can be exercised only to effect the purposes for which they were conferred by the government.² The status of foreign building associations doing business in a state other than that of their incorporation and the questions arising with reference to such will be discussed hereafter.³

§ 8750. **Perpetual Succession.**— Perpetual succession, in a building association, means simply the capacity to take and hold property, without suffering interruption from the change of officers or in the composition of membership.⁴ Thus a mortgage given by one of three trustees to the remaining two, vests, upon the resignation of one of the latter and the appointment of his successor, in the remaining trustee and the successor, without assignment.⁵

§ 8751. **Common Seal.**— The seal of the association is the stamp bearing a certain device, adopted by the association for the purpose of making an impression upon wax, or other impressible substance, affixed or attached to instruments to be executed by the corporation, or upon the paper or parchment on which such instruments are written, as an additional and solemn authentication of the same.⁶ By the addition of the seal, an instrument is made a specialty.⁷

§ 8752. **How Far Bound by the Acts of its Agents.**— In its dealings with the outside world, and in most of its relations with its own members, the association, like any other corporate body, is

tracts involving the exercise of such powers: *Smoot v. People's Perpet. L. & B. Asso.*, (Va.) 29 S. E. Rep. 746; *Bosang v. Iron Belt B. & L. Asso.*, (Va.) 30 S. E. Rep. 440. Compare, however, as to the effect of a validating statute not expressly undertaking to do this, *Crabtree v. Old Dominion B. & L. Asso.*, *supra*.

² *Endl.*, B. A., §§ 217-218. And see *Mills v. Salisbury B. & L. Asso.*, 75 N. C. 292; *Latham v. Washington B. & L. Asso.*, 77 id. 145; *Herbert v. Kenton B. & S. Asso.*, 11 Bush (Ky.) 296; *Gordon v. Winchester B. & A. F. Asso.*, 12 id. 110; *Martin v. Nashville B. Asso.*, 2 Cold. (Tenn.) 418; *State v. Oberlin B. & L. Asso.*, 35 Ohio St. 258; *State v. Greenville B. Asso.*, 20 id. 92; *State v. Amer. S. & L. Asso.*, 64 Minn. 349; 67 N. W. Rep. 1: *Stiles' App.*, 95 Pa. St. 122; *Faulkner's App.*, 11 W. N. (Pa.) 48;

Manuf. & Mech. S. & L. Co. v. Conover, 5 Phila. (Pa.) 18; *Mech. & Workingmen's Mut. Sav. Bank & B. Asso. v. Meriden Agency Co.*, 24 Conn. 159. See *infra*, § 8767.

³ *Infra*, § 8767.

⁴ *Endl.*, B. A., § 219.

⁵ *Walker v. Giles*, 6 O. B. (60 Engl. C. L. Rep.) 662.

⁶ *Endl.*, B. A., § 220. It must be such as to make an impression: *Herder v. Pinkerton*, 14 Allen (Mass.) 381; *Warren v. Lynch*, 5 Johns. (N. Y.) 230.

⁷ *Endl.*, B. A., § 221. See *Jackson v. Myers*, 43 Md. 452, that the addition of the association's seal to its promissory note, properly signed by its president, secretary, treasurer and three directors, did not destroy its negotiability. As to custody, necessity, effect, etc., of the seal, see *Endl.*, B. A., §§ 221-223.

represented by, and acts through, its officers and agents, duly appointed and employed.⁸ For this purpose, and within the sphere of his legitimate authority, each officer, including the directors, is an agent of the society.⁹ Acting within the apparent scope of such authority, their acts are binding upon it.¹⁰ But parties dealing with either officers or special agents are required to take notice of the general extent and limits of such agency.¹¹ An agent's contract, therefore, manifestly in excess thereof, will not make the association liable necessarily, or without further showing of the grant of the power assumed, or of corporate acts amounting to ratification or estoppel.¹² And where the limits of an agent's authority are set forth in such a manner as necessarily to come under the observation of the other party to the contract, the latter, dealing with the agent, is bound to take notice of such limits.¹³ But, when once the association has received the benefit of the agent's transgression of his powers, it cannot at the same time retain them and repudiate his contract.¹⁴

⁸ As to appointment of agents and persons capable of being such, see *Endl.*, B. A., § 228. A managing agent of a building association cannot take an acknowledgment of a mortgage given to it: *Miles v. Kelley*, (Tex.) 40 S. W. Rep. 599.

⁹ *Ibid.*, § 227.

¹⁰ *Ibid.*, §§ 229-230.

¹¹ *Ibid.*, § 231.

¹² *Gass v. Cit. B. & L. Asso.*, 95 Pa. St. 101; *Selden v. Reliable S. & B. Asso.*, 32 Sm. (Pa.) 336,—the former case involving a promise by the secretary, the latter one by the president of a building association, relating to liability upon a loan; *Johnston v. Elizabeth B. & L. Asso.*, 104 Pa. St. 394,—the case of a secretary's declarations as to the amount payable upon a mortgage held by the society, it being held that these declarations were inadmissible in the absence of proof of the secretary's authority to bind the society by them, which was not afforded by the fact that he had charge of its books and accounts; *Fulton B. & L. Asso. v. Greenlea*, (Ga.) 29 S. E. Rep. 932,—a similar case with the opposite conclusions (see *ante*, § 8742, note); *Conway v. Log Cabin Perm. B. Asso.*, 52 Md. 137,—the case of an unauthorized act of its solicitor in plac-

ing a mortgage upon record which had been rejected by the directors (see also *Baxter v. McIntire*, 13 Gray (Mass.) 168, where the cancellation was at the instance of the borrower substituting another bond); *Tradesmen's B. & L. Asso. v. Thompson*, 31 N. J. Eq. 536; 32 *id.* 133.—the case of an unauthorized cancellation of a mortgage by the same officer; *Peabody B. & C. Asso. v. Houseman*, 89 Pa. St. 261,—that of a delegation by him to another of his duty to examine title, and a promise by the latter to the recorder, who made the search, that a certain mortgage should be satisfied, in consequence of which he omitted a reference to it, and, the society losing its money in consequence, he was held liable to make good the loss.

¹³ Thus the powers of an agent of a building association conducting a sale of mortgaged property under an appointment from the mortgagee must be found in the mortgage authorizing the sale, and any representations and agreements made by the agent, beyond the powers therein contained, do not bind the mortgagee: *Lamm v. Port Deposit Homest. Asso.*, 49 Md. 233.

¹⁴ As, where he induced one to become surety for a borrower on the promise that the liability should con-

§ 8753. **Contracts how Executed so as to Bind Principal.**—A contract by an agent of a building association, in order to be binding upon the latter, must show, on its face, that it is the act of the principal, though done by the hand of the agent.¹⁵

§ 8754. **Liability of Association for Frauds and Torts of its Agent**—The association may become liable to third parties for the fraud, deceits, concealments, misrepresentations, torts, negligence and omission of duty of its agents, in course of their employment and within its extent.¹⁶

§ 8755. **Contracts of Building and Loan Associations.**—The test of the contract powers of a building association is to be found, in the first place, in the express statutory or charter grants and limitations, and in the second place, in the absence of such explicit declarations on a given subject, in the purposes of its incorporation.¹⁷ In general, it is only so far as they are distinctly authorized by the former,¹⁸ or so far as they serve the latter, and are confined to the objects necessarily involved therein, that the acts of the association fall properly within its powers. Transgressing these limits, they are *ultra vires*.¹⁹ The principles decisive of the question whether and to what extent their being so constitutes a defense either to the association or to the party dealing with it, in an action to enforce the liabilities assumed, cannot be here discussed in detail.²⁰ A few illustrations will show them to be essentially the same as those applicable to other corporations.

tinue only until the property offered as security should be insured: *Jones v. Nat. B. Asso.*, 94 Pa. St. 215; or agreed with the borrower to insure the mortgaged premises and failed to do so before a loss through fire occurred: *Chicago B. Soc. v. Crowell*, 65 Ill. 453.

¹⁵ *Endl.*, B. A., §§ 234-235. In *Frostbury Mut. B. Asso. v. Brace*, 51 Md. 508, however, an acknowledgment of a mortgage by the attorney of a corporation "to be his act and deed" was held to be a sufficient acknowledgment by the corporation. See also *Kelly v. Rosenstock*, 45 id. 389, where also the omission of the date of the acknowledgment was held not to be fatal. See *Second Manhattan B. Asso. v. Hayes*, 4 Abb. App.

Dec. (N. Y.) 183, to similar effect as to omission of date in acknowledgment of certificate of incorporation.

¹⁶ *Endl.*, B. A., § 238; *Lamm v. Port Deposit Homest. Asso.*, 49 Md. 233.

¹⁷ See *Endl.*, B. A., § 276; *ante*, § 8700. Any act or contract in contravention of the scheme of mutuality on which building associations are based is *ultra vires*; *Baltimore B. & L. Asso. v. Powhatan Impr. Co.*, (Md.) 39 Atl. Rep. 274.

¹⁸ As to the effect of validating statutes, see *ante*, § 8749, note.

¹⁹ Transactions not authorized by statute or rules, and not incidental to the proper business of these societies, are, in general, void: *Small v. Smith*, 10 App. Cas. 119.

²⁰ See *Endl.*, B. A., §§ 277-285.

§ 8756. **Acts Ultra Vires of Building and Loan Associations.**—Defective organization,²¹ or the fact that the association went into operation before the entire amount of the capital stock provided for in the charter was taken, constitutes no defense to a person who has incurred liability towards it.²² Nor, where the by-laws prescribe the maximum number of shares to be held by any one person, does the fact that a member is permitted to hold a greater number absolve him or his guarantors from any claim by the society on account of the excessive shares, whether for stated dues, interest or fines,²³ — any more than one sued by the association upon his note can defend on the ground that the society exceeded its powers in loaning the money for which the note was given to one not a member,²⁴ or in taking a security other than that prescribed by statute, charter, by-law, or custom.²⁵ An arrangement for the repayment of loans and withdrawal of members different from the terms prescribed therefor in the statute or charter, when wholly or partially executed, cannot, whether it be *ultra vires* or not, be rescinded or questioned by either party.²⁶ On the other hand, if an act or contract be distinctly forbidden by legislative prohibition or by the Constitution of the State, the association will not be permitted to recover on the basis of it; as, where, in the fact of a constitutional prohibition upon all corporations attempting to exercise banking powers, except such as were properly qualified for that particular purpose, a building association assumed to engage in the business of purchasing and discounting bills and notes. The maker

²¹ *Fayette v. Free Home B. & L. Assn.*, 27 Ill. App. 307.

²² *Massey v. Cit. B. & S. Assn.*, 22 Kan. 624. See *supra*, §§ 8707, 8717.

²³ *Hagerman v. Ohio B. & S. Assn.*, 25 Ohio St. 186. Compare *Simpson v. Greenfield B. & S. Assn.*, 38 id. 349; *supra*, § 8708, note.

²⁴ *Poock v. Lafayette B. Assn.*, 71 Ind. 357; *Central B. & L. Assn. v. Lampson*, 60 Minn. 422; 62 N. W. Rep. 544; *Reynolds v. Georgia State B. & L. Assn.*, (Ga.) 29 S. E. Rep. 187. But a loan to one, who, at the time of applying for it, was not a member will be treated as a loan to a member, if, before getting the money, he became a member in pursuance of an intention, at the time of the application, which intention entered into and formed part of the transaction: *Ibid.*

²⁵ *Kelly v. Mobile B. & L. Assn.*, 64 Ala. 501; *Union B. & L. Assn. v. Masonic Hall Assn.*, 29 N. J. Eq. 389, 392. See *infra*, § 8759.

²⁶ *Eyre v. Build. Assn.*, 17 Leg. Int. (Pa.) 148; *Miller v. Jefferson B. Assn.*, 50 Pa. St. 32; *Booz's App.*, 109 id. 592; *Hoboken B. Assn. v. Martin*, 13 N. J. Eq. 428. In an action on a mortgage assigned by the association as collateral for payment of an order given to a withdrawing member, it is said that the question whether the consent of the directors to such assignment, under a statutory provision that not more than half the funds in the treasury shall be applicable to such demands, without their consent is legal, is immaterial: *Quein v. Smith*, 108 Pa. St. 325.

of a note so discounted could not be held liable upon it by the association.²⁷ So, where the statute prohibits any member from holding more than twenty shares of stock in building associations, an executory agreement between such a society and a member in respect of a greater number, e. g., an undertaking to pay dues on such, is unenforceable.²⁸ And so, under a statutory denial of the right to loan its money to outsiders, is any contract tending to evade that restriction.²⁹

§ 8757. **Borrowing Powers of these Associations.**— On the question of the power of a building association to contract debts by borrowing money,³⁰ the general result of the most recent decisions in England and America seems to be a concession of the right, without restriction as to amount, beyond this, that it must be for purposes within the lawful powers and business of the association, except where the right is expressly withheld or its exercise limited by statute, charter or by-law provision.³¹ Where such limits are

²⁷ *Manuf. & Mech. Sav. & L. Co. v. Conover*, 5 Phila. (Pa.) 18. But the provision was not held to prevent the purchase of notes by it as an investment: *Ibid.* See *New York Nat. B. & L. Asso. v. Cannon*, (Tenn.) 41 S. W. Rep. 1054, as to whether a court of equity will remove a mortgage, illegal because in violation of law, so as to free the land from a claim upon its title, without payment of the debt.

²⁸ *Simpson v. Greenfield B. & S. Asso.*, 38 Ohio St. 349. Compare *Hagerman v. Ohio B. & S. Asso.*, 25 id. 186, *supra*.

²⁹ *Nat. Investm. Co. v. Nat. S., L. & B. Asso.*, (Wis.) 52 N. W. Rep. 138.

³⁰ An overdrawing of its bank account has been held not in any proper sense, a borrowing of money: *Laing v. Reed*, L. R. 5 Ch. App. 4, per *Hatherley*, L. C. But that view is described: *Looker v. Wrigley*, 9 Q. B. D. 397; *Liquidators of Blackburn & Co. Soc. v. Cunliffe*, 22 Ch. D. 61; *Blackburn & Co. Soc. v. Cunliffe*, 29 Ch. D. 902; *Brooke v. Blackburn & Co. Soc.*, 9 App. Cas. 857. The right to receive deposits from depositors (see *ante*, § 8714) depends, in the absence of express statute authority, upon the existence of the power to borrow money. See *Forest City L. & B. Asso. v. Gal-*

agher, 25 Ohio St. 208; *Criswell's App.*, 100 Pa. St. 488. But where the right is given to receive deposits from members, who, in respect of them, become creditors of the society like outside creditors: *Ibid.*, the receipt of deposits from strangers estops the society and its members, who had the benefit of them, from denying them also the character of creditors: *Ibid.*

³¹ *Endl.*, B. A., §§ 286-302; *Murray v. Scott*, 9 App. Cas. 519; *North Hudson Mut. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31; 47 N. W. Rep. 300; *Davis v. West Saratoga B. Union*, 32 Md. 285; *Canton Nat. B. Asso. v. Weber*, 34 id. 669; *Jackson v. Myers*, 43 id. 452; *Muth v. Dolfield*, ib. 466; *Cook v. Equitable B. & L. Asso.*, (Ga.) 30 S. E. Rep. 911. Compare, as supporting the other doctrine deciding the right of borrowing, in the absence of express statute authorization, or permitting its authorization by charter or by-laws only within a fixed limit: *Laing v. Reed*, *supra*; *In re Nat. Perm. Ben. Soc.*, *Ex parte Williamson*, L. R. 5 Ch. App. 309; *Coetmor Ben. B. Soc.*, 51 L. T. 253; *Moyr v. Sparrow*, 22 L. T. (N. S.) 154; *In re Victoria Perm. B. Soc.*, L. R. 9 Eq. 605; *In re Liverpool & Co. B. Soc.*, 15 S. J. 177; *In re Professional & Co. B. Soc. L.*

prescribed, they must be observed by the directors under pain of personal responsibility for the amount borrowed in excess thereof.³² A building association which has power, express or implied, to contract debts for any given purpose, has power to execute the customary evidences of indebtedness therefor, including negotiable paper.³³ And it has been held, that, to the extent of its borrowing power, the society has the right to assign, as security for its indebtedness, the obligations given to it by those to whom it has made loans.³⁴

§ 8758. Acquisition of Lands by these Associations.—As to the power of a building association to purchase land, there seems to be no difference of opinion that it is strictly confined to the limits fixed by statute or lawful charter provision.³⁵ But in this connection it must be remembered that persons forming a corporation under a general law must have a reasonable latitude as to what they may insert in their articles of association; that, in addition to what the law requires them to insert therein, they may ordinarily insert other provisions also, not inconsistent with the law and pub-

R. 6 Ch. 856; In re Durham Co. B. Soc., Davis' Case, L. R. 12 Eq. 516; Wilson's Case, ib. 521; Re Guardian B. Soc., *Ex parte* Calvert, 23 Ch. D. 440; Blackburn &c. Soc. v. Cunliffe, 29 Ch. D. 902; Neath &c. Soc. v. Luce, 43 Ch. D. 158; Faulkner's App., 11 W. N. (Pa.) 48; Stiles' App., 95 Pa. St. 83; State v. Oberlin B. & L. Asso., 35 Ohio St. 258 (in both of which latter cases the power to borrow money to loan to members was denied): See Rhodes v. Missouri S. & L. Co., 173 Ill. 621; 50 N. E. Rep. 998.

³² Looker v. Wrigley, L. R. 9 Q. B. D. 397; Cross v. Fisher, [1892] 1 Q. B. 467 (C. A.)

³³ Grommes v. Sullivan, 81 Fed. Rep. 45; and under ordinary circumstances a *bona fide* purchaser of a particular obligation executed by the vice-president may presume that it was executed under a state of facts giving the requisite authority, and may hold the society thereon: Ibid. But see Towle v. Amer. B., L. & Impr. Co., 78 Fed. Rep. 688, that a building association is not liable, even to an "innocent holder," upon a draft fraudu-

lently accepted by its vice-president, since such associations have no power to accept drafts.

³⁴ North Hudson Mut. B. & L. Asso. v. First Nat. Bank, (Wis.) 47 N. W. Rep. 300. But see *infra*, § 8781.

³⁵ Id., §§ 303-309; Grimes v. Harrison, 26 Beav. 435; In re Kent Benefit B. Soc., 1 Dr. & Sm. 417; In re Durham Co. Perm. &c. B. Soc., L. R. 12 Eq. 516, per Bacon, V.-C.; Miller's Est., 2 Pears. (Pa.) 248; Rhoads v. Hoernerstown B. Asso., 82 Pa. St. 180; Faulkner's App., 11 W. N. (Pa.) 48. (But compare Cahall v. Cit. Mut. B. Asso., 61 Ala. 232.) And debts incurred therefor by the society give no claim against it: Ibid. In re Kent B. B. Soc., *supra*, though the vendor retains his lien for the unpaid purchase money: Peto v. Hammond, 30 Beav. 495; Faulkner's App., *supra*. As to the effect of an unlawful departure of a building association from its proper functions, in purchasing real estate, see Hughes v. Layton, 10 Jur. (N. S.) 573; s. c., *nom. Reg. v. D'Eyncourt*, 4 Best & S. 820; Miller's Est., *supra*; Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428.

lie policy, germane to the purposes of the incorporation, and necessary, convenient or appropriate to their accomplishment; and that such provisions, lawful as to the State, are binding upon the members of the corporation.³⁶

§ 8759. **Loaning Money by these Associations.**—The power of loaning money³⁷ and taking security therefor,³⁸ is an essential incident to the operation of every building association.³⁹ Primarily, this power extends only to loans to members;⁴⁰ that is, their right to receive advances from the association is superior to its right to lend its funds to strangers or engage them in other business or investments.⁴¹ But, the rights of members being out of the way, the power of the association to loan its money to outsiders⁴² cannot

³⁶ *People v. Preston*, 140 N. Y. 549; 35 N. E. Rep. 979.

³⁷ With the usual incident of reservation of interest: *City B. & L. Co. v. Fatty*, 1 Abb. App. Dec. (N. Y.) 347.

³⁸ See *infra*, § 8781,—Statutory charter provisions, or custom, as to the kinds of security to be taken, do not interfere with the acceptance of other kinds, so as to release the borrower or invalidate the obligation. *Kelly v. Mobile B. & L. Asso.*, 64 Ala. 501; *Union B. & L. Asso. v. Masonic Hall Asso.*, 29 N. J. Eq. 389, 392; *Sheffield & C. B. Soc. v. Aizlewood*, L. R. 44 Ch. Div. 412; *Juniata B. & L. Asso. v. Hetzel*, 103 Pa. St. 507; *Endl. B. A.*, §§ 312–313; *Manuf. & Mech. S. & L. Co. v. Conover*, 5 Phila. (Pa.) 18. Usually the security required is bond, or note, and mortgage of the borrower, with collateral assignment of his stock in the association. But the latter may, in addition thereto, or in lieu thereof, or any part, take the joint bond of the member obtaining the loan to a stranger (*People's B. & L. Asso. v. Billing*, 104 Mich. 186; 62 N. W. Rep. 373, which does not violate a by-law forbidding loans to non-members) or the obligation and mortgage of a third party, not a member: See *Massey v. Cit. B. & S. Asso.*, 22 Kan. 624; *Hughes v. Farmers' S. & B. & L. Asso.*, (Tenn.) 46 S. W. Rep. 362; *Juniata B. & L. Asso. v. Mixell*, 84 Pa. St. 313; *Tanner's App.*, 95 id. 118; *Pfeister v. Wheeling B. Asso.*,

19 W. Va. 676,—who is not entitled to notice of the member's default: *Ibid.*—and the security so taken will stand for the whole undertaking of the borrower: *Ibid.*; *Relief S. F. Asso. v. Longshore*, 8 Luz. L. Reg. (Pa.) 199, though given by a married woman incapable of becoming a member in the association: *Juniata B. & L. Asso. v. Mixell*, *supra*; *Tanner's App.*, *supra*; *Asso. v. Steele*, 11 W. N. (Pa.) 204; *Greenfield's Est.*, 1 Chest. Co. Rep. (Pa.) 356. But see *Smith v. Old Dominion B. & L. Asso.*, 119 N. C. 257; 26 S. E. Rep. 40, where it is held that a wife mortgaging her property for her husband's debt is a surety, who will be released by an unauthorized extension of time for payment, or a tender by the husband of what is justly due and refusal thereof by the society, or a refusal by it to receive such amount stated to be ready,—such refusal waiving formal tender.

³⁹ *Endl. B. A.*, §§ 311–324.

⁴⁰ *Wolbach v. Lehigh B. & L. Asso.*, 84 Pa. St. 211 (and *obiter*: *Stiles' App.*, 95 id. 122); *State v. Oberlin B. & L. Asso.*, 85 Ohio St. 258; *Pooch v. Lafayette B. Asso.*, 71 Ind. 357; *St. Joseph & Kansas L. & B. Asso. v. Thompson*, 19 Kan. 321; *Howard Mut. L. & F. Asso. v. McIntire*, 3 Allen (Mass.) 571.

⁴¹ See *supra*, § 8725; *Mechan. & Workingm. Mut. Sav. Bk. & B. A. v. Wilcox*, 24 Conn. 147; *Same v. Meriden Agency Co.*, id. 159.

⁴² Including corporations: *Endl. B.*

be questioned,⁴³ unless, indeed, there be a statutory prohibition against it; in which case any contract intending to evade it is void.⁴⁴ Of course, the incidents of a loan to a stranger are not the same as those of one to a member; the transaction being, in such case, a bare loan at interest, affected by the usury laws.⁴⁵

§ 8760. Trafficking in Stock: Compositions with its Members.—

The association has no right to traffic in its own stock.⁴⁶ But it has a right to compromise, in good faith and reasonably, with a member, and by such compromise to acquire his stock interest for the purpose of extinguishing it, and to release him from further liability to the society, whether the same be upon a loan or simply on his stock subscription.⁴⁷

A., § 323; Union B. & L. Asso. v. Masonic Hall Asso., 29 N. J. Eq. 389. Compare *Hardy v. Metropol. L. & F. Co.*, L. R. 7 Ch. App. 427; *In re Durham Co. & C. Soc.*, L. R. 12 Eq. 516; *Mechanics & Workingm. S. Bk. & B. Asso. v. Meriden Agency Co.*, 24 Conn. 159; and see *supra*, § 8710.

⁴³ *Endl.*, B. A., § 314; *Cutbill v. Kingdom*, 1 Exch. 494, 505; *Union B. & L. Asso. v. Masonic Hall Asso.*, 29 N. J. Eq. 389, 392; *Mechanics' & Workingm. Mut. Sav. Bk. & B. Asso. v. Wilcox*, 24 Conn. 159; *Poock v. Lafayette B. Asso.*, *supra*; *Wolbach v. Lehigh B. & L. Asso.*, *supra*; *St. Joseph & Kan. L. & B. Asso. v. Thompson*, *supra*. And see *Pfeister v. Wheeling B. Asso.*, 19 W. Va. 676.

⁴⁴ *Nat. Investm. Co. v. Nat. S. L. & B. Asso.*, (Wis.) 52 N. W. Rep. 138.

⁴⁵ *Endl.*, B. A., §§ 313, 316-318; *Wolbach v. Lehigh B. & L. Asso.*, *supra*; *St. Jos. & Kan. L. & B. Asso. v. Thompson*, *supra*; *Vermont L. & T. Co. v. Whitted*, (N. D.) 49 N. W. Rep. 321. In the class of outsiders must be included, for this purpose, all who are not *sui juris*, as infants and married women, who are not by statute enabled to assume the usual obligations incurred by borrowers in building associations, *supra*, § 8708; *Wolbach v. Lehigh B. & L. Asso.*, *supra*; *Build. Asso. v. Rice*, 8 W. N. (Pa.) 12. But where a married woman, not so enabled by statute, takes a loan and her husband becomes her surety,

he will be held to the full obligation: *Wiggins' App.*, 100 Pa. St. 155; and where a married woman, before the enactment of an enabling statute, took a loan, and after the passage of such a statute continued to recognize it and remained a member for one and a-half years, she cannot thereafter set up as a defense her disability at the time she entered into the contract: *Dilzer v. Beethoven B. Asso.*, 103 Pa. St. 86. See discussion of this subject, *Endl.*, B. A., §§ 317-319; *Build. & Loan News*, July & Aug. 1890; and compare *supra*, § 8759, note. Where a married woman borrower did not set up her coverture as to a defense, her next of kin after her death cannot do it: *Kingsessing B. Asso. v. Roan*, 9 W. N. (Pa.) 15. A loan misapplied is treated as a loan to a stranger in *Pfeister v. Wheeling B. Asso.*, 19 W. Va. 676.

⁴⁶ *Heggie v. B. & L. Asso.*, 107 N. C. 581; 12 S. E. Rep. 275; *State v. Oberlin B. & L. Asso.*, 35 Ohio St. 258; *Wangerien v. Aspell*, (O.) 24 N. E. Rep. 405. See the latter case as to what constitutes such traffic and what does not.

⁴⁷ See last two cases in preceding note; *Miller v. Jefferson B. Asso.*, 50 Pa. St. 32; *Watkins v. Workingmen's B. & L. Asso.*, 97 id. 514; *Booz's App.*, 109 id. 592; *People v. Lowe*, 117 N. Y. 175; 22 N. E. Rep. 1016; *Endl.*, B. A., §§ 325, 326; *Build. & L. News*, Sept., 1890. The binding effect of such settlements seems to be denied in

§ 8761. **Different Kinds of Stock: Dividends.**—In the absence of express statutory authorization, a building association has no general power to declare and pay, annually or otherwise, out of its profits, dividends upon stock issued in the ordinary way, before winding up of the society or the several series.⁴⁸ But, under a statute, which, whilst providing for the payment of stock subscribed in building associations in installments, as the by-laws shall prescribe, also authorize the directors to allow interest, not exceeding a certain rate, on such installments as are paid in advance, a building association has a clear right to receive full payment of the stock in advance and issue paid-up or prepaid stock bearing interest at any rate within the limit fixed.⁴⁹ It has also been said that where a building association has the right to incur indebtedness by borrowing money, it has the power to issue “coupon stock,” i. e., stock bearing interest at a certain rate periodically, the subscriber paying the society the face value of the stock in advance, with the privilege to him of withdrawing upon a certain notice, and to the society of calling in the stock and refunding the amount paid upon similar notice.⁵⁰ The true view, supported by the weight of reason and authority, would seem to be, that, positive and binding statutory or charter restrictions out of the way, and without reference to any borrowing power, a building association may permit its member, instead of paying his stock in periodical installments, to make advance payments thereon, or to prepay it in full,⁵¹ and in consideration of such prepayment to issue to him prepaid or full-paid stock, on which he will be allowed a rebate or a moderate amount of interest or periodical profit, payable out of

Haigh v. U. S. B. & c. Asso., 19 W. Va. 792; *Heggie v. B. & L. Asso.*, *supra*; *McKeown v. B. A.*, 5 Bull. 52. That they are not binding when made in favor of officers of the association, see *supra*, § 8744.

⁴⁸ *Endl.*, B. A., § 327; *supra*, § 8729; *State v. Oberlin B. & L. Asso.*, 35 Ohio St. 258; *Seibel v. Victoria B. Asso.*, 43 id. 371. As to declaring dividends out of capital, see *Kisterbock's App.*, 51 Pa. St. 485; *supra*, § 8743. Where dividends may be declared out of the earnings quarterly, the dividend need not every time be of the whole earnings of the quarter, and a later one may include earnings of a previous quarter: *Marks v. Monroe Perm. S. & L. Asso.*, 52 N. Y. S. R. 451;

but premiums bid are not “earnings:” *Ibid.* Compare *Boone v. Homest. L. Asso.*, 23 N. Y. Supp. 203.

⁴⁹ *Latimer v. Equitable L. & Inv. Co.*, 81 Fed. Rep. 776.

⁵⁰ *Cook v. Equitable B. & L. Asso.*, (Ga.) 30 S. E. Rep. 911.

⁵¹ *Endl.*, B. A., §§ 461-464; In re *Guardian Perm. Ben. B. Soc.*, *Scott's Case*, 23 Ch. D. 440; *People v. Preston*, 140 N. Y. 549; 35 N. E. Rep. 979; *Hohenshell v. Home S. & L. Asso.*, 140 Mo. 566; 41 S. W. Rep. 948; *State v. Equitable L. & Inv. Asso.*, 142 Mo. 325; 41 S. W. Rep. 916; *Heptasoph B. & L. Asso. v. Linhart*, 4 Pa. Dist. Rep. 620. See also *Leahy v. Nat. B. & L. Asso.*, (Wis.) 76 N. W. Rep. 625.

the earnings,⁵² and if the charter makes provision for it,⁵³ a preference, or priority, in respect of such stock over other stock.⁵⁴ Of course, an attempt to allow profits, whether called interest, dividends or income, regardless of the ability of the society to pay them out of its earnings, must, unless founded on express statutory permission, be unlawful;⁵⁵ and for the same reason it is doubtless true that in the absence of such permission, a building association cannot lawfully issue a certificate of stock wherein it agrees to pay the subscriber the full face value thereof at the end of a specified period, on payment of a fixed periodical installment during the running of the same.⁵⁶ And yet persons accepting a species of paid-up stock which the society is not empowered to issue cannot, on the ground of its illegality, claim to be treated as depositors or creditors of the society, and as such to be preferred over the holders of ordinary and lawful stock to the extent of the excess of the former's payments over those of the latter, but must come in *pari passu* with them in proportion to the amount paid in by holders of all classes.⁵⁷ Building associations may also, it would seem, issue stock classified according to the amounts to be periodically paid thereon, if the charter makes proper provisions therefor.⁵⁸

⁵² See the same authorities.

⁵³ The right to issue preferred stock must be given in the charter, otherwise all the stock must be the same: See 1 Cook, Stock., &c., § 268; Kent v. Quicksilver Mining Co., 78 N. Y. 159. See the latter case for a demonstration that none of the powers above discussed have anything to do with, or in any way rest upon, or involve, the power of borrowing money.

⁵⁴ See the English and New York cases cited in the note preceding the last, and Murray v. Scott, 9 App. Cas. 519. The Missouri cases deny this power except there be statutory warrant for it, and in Latimer v. Equitable L. & Inv. Co., *supra*, the right of the society, in the absence of express statutory authority, to pledge part of its assets for the payment of one class of its stock in preference to other is negatived. It is decided that building associations governed by the laws of North Carolina cannot issue dividends bearing stock: Meroney v.

Atlanta Nat. B. & L. Asso., 116 N. O. 922; 21 S. E. Rep. 924.

⁵⁵ Endl., B. A., § 464, since that is a thing no corporation can do: 1 Cook, Stock., &c., § 277.

⁵⁶ King v. Internat. B., L. & I. Co., 170 Ill. 135; 48 N. E. Rep. 677.

⁵⁷ Gibson v. Safety Homest. & L. Asso., 170 Ill. 44; 48 N. E. Rep. 580; Leahy v. Nat. B. & L. Asso., (Wis.) 76 N. W. Rep. 625. That holders of such stock must, at all events, rank as members (in the case last cited, they are declared to be such, in spite of a declaration to the contrary in his certificate of stock) and not as creditors is clear from the Missouri cases above cited, and from the decisions in Towle v. Amer. B. & L. Asso., 75 Fed. Rep. 938; Post v. Mechanics' B. & L. Asso., 97 Tenn. 408; 37 S. W. Rep. 216; and is, of course, inconsistent with the idea that the issuing of such stock is a borrowing of money.

⁵⁸ Endl., B. A., § 465.

§ 8762. **Actions by these Associations: Allegation of Default.—**

A building association has the same power of instituting suit, and is subject to the same liability to be sued, as other corporations.⁵⁹ In all suits involving the rights of shareholders, the association, plaintiff or defendant, represents them, and a judgment against it binds them in the absence of fraud.⁶⁰ Being the holder of an obligation executed to it by a name differing from its corporate title, it may sue in its right name, averring that it is the party intended.⁶¹ And if, being plaintiff, it has been misnamed in bringing a bill in equity, the defect may be cured by amendment at the hearing.⁶² An indorsement upon the summons served on a building association, referring to the within writ, but giving merely the initials of the society's name, creates an ambiguity that is removed by examining the writ, in which the name appears in full.⁶³ In a suit by the association on a note, reciting that it is given for money loaned under the constitution, by-laws and regulations of the society, a copy of these need not be filed and made part of the complaint;⁶⁴ nor need the latter aver with particularity the method of making the assessments for the payment of which the note in suit is given;⁶⁵ or the filing of the acceptance by the society of a statute required to be filed by it.⁶⁶ But where the suit is for the enforcement of an obligation, before its apparent maturity, upon default in the stipulated payments for a certain length of time (which is a condition precedent to the right to sue upon it), the default must be specifically alleged, in conformity with the terms of the instrument.⁶⁷ A fraudulent satisfaction by an officer of the association

⁵⁹ See *Endl., B. A.*, §§ 240-259. A statute requiring corporations instituting suits to give bond for costs applies to a building association. *Shelly v. Newport Sav. Asso.*, 11 Bush (Ky.) 305.

⁶⁰ *Heggie v. B. &c. Asso.*, 107 N. C. 581; 12 S. E. Rep. 275.

⁶¹ *Franklin Ave. &c. Institution v. Roscoe Bd. of Education*, 75 Mo. 408; *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428.

⁶² *Ibid.*

⁶³ *Odd Fellows' B. A. v. Hogan*, 28 Ark. 261.

⁶⁴ *Anderson B. &c. Asso. v. Thompson*, 88 Ind. 405; nor, if filed, will they be considered a part of the complaint: *Newman v. Ligonier B. &c. Asso.*, 97 id. 295, Compare *Hatfield v. Hunting-*

ton City B. & S. Asso., (Ind.) 31 N. E. Rep. 532, where the whole was treated as one instrument. But, the certificate of stock held by the borrower, defendant in an action to foreclose his mortgage, and referred to in the same, is admissible in evidence: *U. S. S. & L. Co. v. Cade*, 15 Wash. 38; 45 Pac. Rep. 656.

⁶⁵ *Borchus v. Huntington B. &c. Asso.*, 97 Ind. 180.

⁶⁶ *Ibid.*

⁶⁷ *Swift v. Allegheny B. & L. Asso.*, 82 Pa. St. 142; *Second Amer. B. Asso. v. Platt*, 5 Duer (N. Y.) 675; *Schaeffer v. Amicable Perm. L. & L. Co.*, 47 Md. 126; *Lime City B., S. & L. Asso. v. Wagner*, 122 Ind. 78; 23 N. E. Rep. 689. And see *Wilson v. Schoenlaub*, 99 Mo. 96; 12 S. W. Rep. 361. The

of his mortgage to it, followed by a cessation of his payments, may be treated as a default.⁶⁸

§ 8763. **Averment of Corporate Capacity.**—It was held in Missouri, in a suit by a building association, that its averment that it was a corporation "duly incorporated under and by virtue of an Act of General Assembly of the state of Missouri; entitled," etc., was a sufficient allegation of plaintiff's corporate existence.⁶⁹ But, it seems, ordinarily no specific allegation of that fact is required,⁷⁰ and the latter can be put in issue only by a plea of *nul tiel corporation*.⁷¹

§ 8764. **Defenses to Such Actions.**—Allegations of payment to be made in defense require great certainty in statement and proof to apply them to the particular claim in suit.⁷² A tender of the amount actually due the association, or of such terms as will satisfy its just demands, and render a suit unnecessary, made before suit brought, or, with accrued costs, after its commencement, will stop interest and make the association liable to costs, though remaining entitled to a decree.⁷³ Proof that the series of the stock to which defendant belongs has matured and that his shares are worth a sum equaling the amount of the bond he is sued upon, constitutes a defense.⁷⁴ A defense on the ground of misrepresentations in-

period of default begins to run from the first day of the month next following that of which the dues, etc., were last fully paid, and partial payments are ignored: *Barndt v. Greul*, 4 Leg. Gaz. (Pa.) 388. See *supra*, § 8720. But a failure to pay for five months, followed by payments for each succeeding month, is not a default for six months: *Build. Assn. v. Hopple*, 12 W. N. (Pa.) 222.

⁶⁸ *Quein v. Smith*, 108 Pa. St. 325, 332.

⁶⁹ *Chillicothe Sav. Assn. v. Ruegger*, 60 Mo. 218.

⁷⁰ Impliedly it is averred by the name itself: *Stein v. Indianapolis B. & C. Assn.*, 18 Ind. 237; *Odd Fellows' B. Assn. v. Hogan*, 28 Ark. 261.

⁷¹ *Ibid.* As to that allegation, see *supra*, § 8707.

⁷² *Endl. B. A.*, § 248; *Selden v. Reliable S. & B. Assn.*, 32 Sm. (Pa.) 336; *Assn. v. Wall*, 7 Phila. (Pa.) 240; *Watkins v. Workmen's B. & L. Assn.*,

97 Pa. St. 514. In general, payments are presumed to have been made on account of fines and dues: *Selden v. Rel. S. & B. Assn.*, *supra*. If the pass-book be lost, the proof of payments must be clear, uncertain, vague and indefinite statements being insufficient: *Clarkville B. & L. Assn. v. Stephens*, 26 N. J. Eq. 351.

⁷³ *Columbian B. Assn. v. Crumb*, 42 Md. 192.

⁷⁴ *Charles Tyrell L. & B. Assn. v. Haley*, 139 Pa. St. 477; 20 Atl. Rep. 1063; *Same v. Same*, 163 Pa. St. 301. But the burden of making such a proof (as also of showing the want of any prerequisites necessary to make the contract of loan, with its peculiar incidents, binding upon him: *Build. Assn. v. Lyons*, 2 Kulp (Pa.) 409; *Nicely's Est.*, 3 id. 47. is upon the defendant when sued by the association for his indebtedness, under a plea of payment: *Watkins v. Workmen's B. & L. Assn.*, 97 Pa. St.

ducing the defendant to become a borrower in the society is not made out by proof of statements by its officers, oral and by circular, as to the advantages and cheapness of loans in it where the borrower freely and voluntarily entered into the arrangement thus held out and sought no relief until, after experimenting with it for several years, he concluded that it was not what he expected it to be.⁷⁵

514. The report of auditors is *prima facie* evidence of the condition of the officers' book, though impeachable for fraud: *Holgate v. Shutt*, 27 Ch. D. 111; 28 id. 111; and a declaration by the directors of the shares as fully paid up must prevail in the absence of proof of mistake or loss: *Mechanics' &c. B. Asso. v. Monroe*, (Pa.) 7 Atl. Rep. 728; 6 Centr. Rep. 580.

⁷⁵ *Quincy B. & L. Asso. v. Winget*, 29 Ill. App., 173; *aff'd*, 128 Ill. 67; 21 N. E. Rep. 12. As to statements by the secretary, see *ante*, § 8741.

CHAPTER CXXLI.

BY-LAWS.

SECTION

8767. By-laws of building associations, and their interpretation.
8768. Conformity of by-laws with charter and statute.
8769. Reasonableness of by-laws: retrospective by-laws: by-laws

SECTION

- quiring submission of disputes to arbitration.
8770. Alteration of by-laws: notice of the alteration.

§ 8767. **By-laws of Building Associations, and their Interpretation.**—The power of ordaining by-laws, a sort of private statutes for the internal government of the association, is incidental to its corporate character, even where not expressly conferred.¹ The power ordinarily resides in the corporate meeting, and can be delegated to a particular body of officers, e. g., the Board of Directors, only by express charter or original by-law provision; and all the prescribed forms must be observed in the adoption of by-laws, in order to give them validity.² In addition thereto, they must conform (1) with existing and supreme laws, i. e., the Constitution of the United States and of the particular States, all valid acts of Congress and of the State legislature, and with the prevailing common law; (2) with the charter, its letter and spirit; (3) with reason and equity.³ Of two possible interpretations of a by-law, that which makes it lawful is to be preferred;⁴ as also is that which comports with the uniform and well-understood course of dealing in the society, amounting to a practical construction,⁵ especially if cal-

¹ Endl., B. A., § 260. Clauses in a charter granted by special act of legislature giving "the force and effect of legal enactment to the constitution and by-laws" that may be adopted, give them no greater sanction than that usually given in charters containing no such provisions: *Martin v. Nashville B. Asso.*, 2 Cold. (Tenn.) 418.

² Endl., B. A., *ubi supra*.

³ *Lynn v. Freemansburg B. & L. Asso.*, 117 Pa. St. 1, 12.

⁴ *Simpson v. Greenfield B. & S. Asso.*, 38 Ohio St. 349.

⁵ *McDonough v. Hennepin Co. Cath. B. & L. Asso.*, 62 Minn. 122; 64 N. W. Rep. 106.

culated to give effect to the ascertained design of the framers,⁶—and that which is consonant with reason and equity.⁷

§ 8768. **Conformity of By-Laws with Charter and Statute.**—As a general rule, a by-law which violates any provision of the charter or Constitution is absolutely void.⁸ But this rule is subject to the qualification, that the authority given by a charter under a general statute is not absolutely conclusive upon the right or disability of the society to do an act; and, as a charter provision, in such case, contravening the statute, is wholly void,⁹ a building association may adopt a valid resolution or by-law contradictory of the charter, but conforming to the statutory provision.¹⁰ A by-law conflicting with the latter is a nullity¹¹ and confers no rights and imposes no obligations.¹² A by-law contravenes the statute or charter whenever it is destructive of the purposes of the corporate existence declared by either,¹³ or contravenes the scheme of mutuality upon which building associations are based.¹⁴

§ 8769. **Reasonableness of By-Laws: Retrospective By-Laws: By-Laws Requiring Submission of Disputes to Arbitration.**—The reasonableness, or equitableness, required of the rules of building asso-

⁶ Baltimore B. & L. Asso. v. Powhatan Imp. Co., (Md.) 39 Atl. Rep. 274.

⁷ Southern B. & L. Asso. v. Harris, (Ky.) 32 S. W. Rep. 261. so that a by-law giving a borrower the right to repay on thirty days' notice and to withdraw after ninety days, does not make repayment a condition precedent to withdrawal, but permits him to do both in one and the same transaction.

⁸ Endl., B. A., §§ 262-267; Martin v. Nashville B. Asso., 2 Cold. (Tenn.) 418; Herbert v. Kenton B. & S. Asso., 11 Bush (Ky.) 296; Gordon v. Winchester B. & A. F. Asso., 12 id. 110; Mills v. Salisbury B. & L. Asso., 75 N. C. 292; Latham v. Washington B. & L. Asso., 77 id. 145; Lord & Robinson v. Essex B. Asso., 37 Md. 320; Stiles' App., 95 Pa. St. 83; Orangeville Mut. S. Fund & L. Asso. v. Young, 9 W. N. (Pa.) 251; Rodgers v. South West. Mut. S. F. & B. Asso., 7 id. 95; State v. Greenville B. Asso., 29 Ohio St. 92; State v. Oberlin B. & L. Asso., 35 id. 258. Where the constitution prescribes the fines so imposed on delin-

quent members, it thereby fixes the limit beyond which the society cannot go, but it may impose fines at a less rate, and a by-law so doing will govern: Dupuy v. Eastern B. & L. Asso., 93 Va. 460; 25 S. E. Rep. 537.

⁹ *Supra*, § 8707, note, and § 8749.

¹⁰ Booz's App., 109 Pa. St. 592.

¹¹ Trowbridge v. Hamilton, (Wash.) 52 Pac. Rep. 328.

¹² Cullerne v. London & Suburb. &c. B. Soc., (C. A.) 25 Q. B. D. 485; Stiles' App., 95 Pa. St. 122; Orangeville Mut. S. F. & L. Asso. v. Young, 9 W. N. (Pa.) 251; State v. Greenville B. Asso., 29 Ohio St. 92; State v. Oberlin B. & L. Asso., 35 id. 258; Rogers v. S. W. Mut. S. F. & B. Asso., 7 W. N. (Pa.) 95.

¹³ Bergman v. St. Paul Mut. B. Asso., 29 Minn. 275; 13 N. W. Rep. 120.

¹⁴ Baltimore B. & L. Asso. v. Powhatan Imp. Co., (Md.) 39 Atl. Rep. 274. Where the question, whether, in point of fact, a by-law is such as to frustrate the legitimate and declared objects of the association, the jury

ciations is the same, making due allowance for the character of its business, etc., as is recognized as an essential in the by-laws of every corporation.¹⁵ It forbids, among other things, to such by-laws any retroactive efficacy in abrogation of subsisting contract rights; and the articles of association and by-laws existing at the time of acquisition of membership are in many respects to be regarded as establishing, between the association and every member, and among themselves, such rights of a fundamental character.¹⁶ For instance, where the existing rules provided for the settlement of disputes between the society and a member by arbitrators chosen from a standing board, the society cannot change that rule to the prejudice of a member with whom it has a dispute pending, by making the board of arbitration one of its own choosing in every case.¹⁷ But it does not forbid alterations in the by-laws, of a mere regulative kind, or which are not inconsistent with the fundamental scheme of the incorporation, but in the line of its original purpose, conducive to perfect equality of benefits and burdens, though they affect (without destroying) vested rights, so long as the alterations relate to the duties and rights springing from the contract of membership, and not from other purely contract relations; because, on all questions of the rights and duties incident to membership, every member, by his fundamental contract of membership, pledges his assent in advance to every lawful rule adopted by the majority in furtherance of the common objects.¹⁸ Nor does the requirement of reasonableness in by-laws forbid provisions looking to the adjustment of difficulties between the association and its members by a system of amicable arbitration, even to the exclusion, until it has been exhausted, of the right of suit.¹⁹ Especially, where such an arrangement has become part of the express agreement between the association and its member, will it be enforced.²⁰ Acquiescence in a

may become practically the judge of the legality or illegality: *Parker v. Fulton L. & B. Asso.*, 46 Ga. 166.

¹⁵ See *Endl.*, B. A., §§ 268-270; and *infra*, §§ 8777, 8778.

¹⁶ *Bergman v. St. Paul &c. Asso.*, *supra*; *Christie v. North Counties &c. Soc.*, 43 Ch. D. 62.

¹⁷ *Christie v. North Counties &c. Soc.*, *supra*.

¹⁸ See cases cited *ante*, § 8721, note. See also *post*, § 8784, and *Endl.*, B. L., §§ 141-142, 269.

¹⁹ See *Endl.*, B. A., § 271.

²⁰ See *White v. Mech. B. Asso.*, 22 Gratt. (Va.) 233. In England the system is established, as to building societies, by statute, which, to that extent, ousts the jurisdiction of the courts: *Hack v. London &c. Soc.*, L. R. 23 Ch. Div. 103; *Municip. &c. Soc. v. Kent*, L. R. 9 App. C. 260. As to what disputes do or do not come under such provisions, see *French v. Munic. &c. Soc.*, 53 L. J. Ch. D. 745; *Johnson v. Altrinchau &c. Soc.*, 49 L. T., (N. S.) 508; *supra*, § 8733; and as to the composition and selection of the

by-law and enjoyments of benefits under it estop from questioning its validity.²¹

§ 8770. Alteration of By-Laws: Notice of the Alteration.—

The power to make by-laws includes, of course, within like limits, that of altering them from time to time; nor is this power affected by the circumstance that all the members have signed the original constitution and by-laws.²² And the question whether or not a member has had notice of the alteration or addition is ordinarily immaterial, his contract of membership pledging, in advance, obedience to any lawful by-laws that may be adopted by the society, and excluding the supposition that they are to remain as they stand at the time of his becoming a member.²³

board, *Christie v. Northern Counties P. B. Build. Soc.*, L. R. 43 Ch. D. 62.

²¹ *Building Asso. v. Minnick*, 1 Kulp (Pa.) 513; *Building Asso. v. Arbeiter Bund*, 6 Bull. 823.

²² *Wangerien v. Aspell*, (Ohio) 24 N. E. Rep. 405; *Rosenburg v. Northumberland B. Soc.*, 22 Q. B. D. 373.

²³ *Ibid.*; *Endl.*, B. A., § 272; *supra*, §§ 8716, 8729.

CHAPTER CCXLII.

LOANS.

SECTION

- 8772. Building association loans.
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- 8775. Payments for shares.
- 8776. Interest upon such loans.
- 8777. Fines for non-payment of dues.
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- 8782. Remedies against one who purchases subject to such a mortgage.
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- 8784. Voluntary repayment by the borrower.
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- 8787. Effect of repayment, etc., on membership: application of stock.

§ 8772. **Building Association Loans.**—When a member of a building association obtains from it a loan,¹ the arrangement whereby the association is to be reimbursed embraces essentially the following undertakings on the part of the borrower: (1) An agreement to pay the premium bid; (2) an agreement to make stock payments at the appointed times and rates (with the incidental liability for fines, forfeiture, etc., according to the law of the association) up to the date of the maturity of the stock or the expiration of the society's corporate existence; (3) a concession to the association of the right to appropriate to itself, at the maturity of the stock in full, upon default in partial discharge of these liabilities, the accumulations standing to the borrower's credit; and (4) a promise to pay interest or redemption money to the date of final settlement.² It is obvious that the presence of these elements distinguishes the transaction from one of mere lending and borrowing of money. Whatever the amount advanced, and whatever the premium bid, the exact sum which it will cost the borrower eventually to discharge his obligation remains uncertain, and the exact number of his payments on account of interest or redemption money cannot be known, at the time the transaction creating the obligation takes

¹ *Supra*, § 8704.

² *Endl., B. A., §§ 124-125, 329-364; Build. & Loan News, Feb., 1889.*

place. The aggregate of his ultimate outlay depends upon the success of the association. As soon as his stock is equal to its par value, it is equal to his indebtedness, and, being set off against it, extinguishes it, no matter whether the sum total of his payments is inferior to, equals or exceeds the sum advanced to him with premium and interest. The element of fines, of course, is incalculable in advance. At the same time, remaining a member of the corporation, he is, in effect, at once his own creditor and his own debtor. It is the sum of all contributions to the corporate treasury, including those of all other members as well as his own, and of the earnings and profits made in the use and investment of this entire fund, that gradually enhances the value of the whole capital stock to such a figure as to make his share of it an equivalent receivable by the association in payment of his debt. In other words, the transaction, far from being a naked loan by one stranger to another, as in form it often appears to be, is, in substance, a dealing in relation to partnership funds, in which the corporate body represents the mass of the members as contracting with the individual, and in which the sum ultimately required to be paid in fulfilment of the contract is, at the time of the advancement, wholly uncertain and dependent, in a large measure, upon contingent and fortuitous events.³

§ 8773. Conflict of Decisions as to Character of such Loans.—

¹As such it has been recognized by the courts of England,⁴ Maryland,⁵ Kansas,⁶ North Dakota,⁷ Massachusetts,⁸ Louisiana,⁹ Arkan-

³ Compare *supra*, § 8708, note.

⁴ *Silver v. Barnes*, 6 Bing. N. C. 180; 8 Scott, 300; 37 Engl. C. L. 335 (in this case, the question was really left to the jury; but it has since been treated as decisive of the theory excluding usury as an element); *Burbridge v. Colton*, 5 De G. & Sm. 17; 8 Engl. L. & Eq. Rep. 57; *Seagrave v. Pope*, 1 De G., M. & G. 783; 15 Engl. L. & Eq. Rep. 477; *Cutbill v. Kingdom*, L. R. 1 Exch. 494; *In re Durham Co. Perm. Ben. B. Soc.*, L. R. 12 Eq. 516.

⁵ *Robertson v. American Homest. Asso.*, 10 Md. 397; *Shannon v. Howard Mut. B. Asso.*, 36 id. 383; *Lester v. Log Cabin B. Asso.*, 38 id. 115; *Williar v. Balto. B. L. & A. Asso.*, 45 id. 564. Compare, however, *Balto. v. Permanent B. & L. Soc. v. Taylor*, 41 id. 409; *Birmingham v. Maryland L. & T.*

Homest. Asso., 45 id. 541; *Border State &c. Asso. v. McCarthy*, 57 id. 555; *Home &c. B. Asso. v. Thursby*, 58 id. 284; *Geiger v. Eighth Germ. B. Asso.*, ib. 569.

⁶ *Massey v. Citizens' B. & L. Asso.*, 22 Kan. 624. But see *Hekelukaemper v. German B. Asso.*, ib. 549; *Glynn v. House B. Asso.*, ib. 746.

⁷ *Vermont L. & T. Co. v. Whited*, (N. Dak.) 49 N. W. Rep. 318.

⁸ *Delano v. Wild*, 6 Allen, 1; *Bowker v. Mill River L. & F. Asso.*, 7 id. 100. Compare *Merrill v. McIntire*, 13 Gray, 157; *Baxter v. McIntyre*, ib. 168; *Barker v. Bigelow*, 15 id. 130.

⁹ *Amer. Homest. Co. v. Linigan*, 46 La. An. ; 15 South. Rep. 369; *Latchford's Succession*, 42 La. An. 539; 7 South. Rep. 628; *Richards v. South West B. & L. Asso.*, 49 La. An. 481; 21 South. Rep. 643.

sas,¹⁰ Alabama,¹¹ Minnesota,¹² Illinois,¹³ New Jersey,¹⁴ New Hampshire,¹⁵ New York,¹⁶ Georgia,¹⁷ and Tennessee.¹⁸ On the contrary, it has been regarded as a mere contract of loan in Pennsylvania,¹⁹ Texas,²⁰ North Carolina,²¹ South Carolina,²² Kentucky,²³

¹⁰ *Reeve v. Ladies' &c. Asso.*, 56 Ark. 335; 19 S. W. Rep. 917; *Block v. Tompkins*, 63 Ark. 502; 39 S. W. Rep. 553. And see *Taylor v. Van Buren B. & L. Asso.*, 56 Ark. 340; 19 S. W. Rep. 918; *Tilley v. Amer. B. & L. Asso.*, 52 Fed. Rep. 618.

¹¹ *Security &c. Asso. v. Lake*, 69 Ala. 456. See also *Montgomery B. & L. Asso. v. Robinson*, id. 413, and *Mobile B. &c. Asso. v. Robertson*, 65 id. 389.

¹² *Fagan v. People's S. & L. Asso.*, 55 Minn. 437; 57 N. W. Rep. 142.

¹³ *Holmes v. Smythe*, 100 Ill. 413; *Freeman v. Ottawa &c. Asso.*, 114 id. 182; *Winget v. Quincy B. & L. Asso.*, 128 id. 67,—also holding that a general statute providing, as to building associations, that no fines, premiums, etc., should be deemed usurious, is not obnoxious to constitutional provisions. See on similar points, to same effect: *Vermont L. & T. Co. v. Whithed*, 2 N. Dak. 82; 49 N. W. Rep. 318; *Livingston L. & B. Asso. v. Drummond*, 49 Neb. 200; 68 N. W. Rep. 375; *Archer v. Baltimore B. & L. Asso.*, (W. Va.) 30 S. E. Rep. 241,—and *contra*, *Henderson B. & L. Asso. v. Johnson*, 88 Ky. 191; 10 S. W. Rep. 787.

¹⁴ *Clarkville B. & L. Asso. v. Stephens*, 26 N. J. Eq. 351; *Hoboken B. Asso. v. Martin*, 13 id. 428; *Franklin B. Asso. v. Marsh*, 29 N. J. L. 225.

¹⁵ *Shannon v. Dunn*, 43 N. H. 194.

¹⁶ *Cit. Mut. L. Asso. v. Webster*, 25 Barb. 263; *City B. & L. Asso. v. Fatty*, 1 Abb. App. Dec. 347. But see *Melville v. American Benef. B. Asso.*, 33 Barb. 103; and compare *Concordia S. & A. Asso. v. Read*, 93 N. Y. 474, where the question is decided on the basis of the statute.

¹⁷ *Parker v. Fulton L. & B. Asso.*, 46 Ga. 166; *Bibb Co. L. Asso. v. Richards*, 21 id. 592; *Pattison v. Albany B. & L. Asso.*, 63 id. 373; *Hawkins v. American Nat. B. & L. Asso.*, (Ga.) 22 S. E. Rep. 711; *Bosworth v. Sumter R. E. & Impr. Co.*, (Ga.) 28 S. E. Rep. 154. And see *Van Pelt v. Home B. & L. Asso.*, 79 id. 439; 4 S. E. Rep. 501.

¹⁸ *Patterson v. Workingmen's Bldg.*

Asso., 14 Lea, 677 (overruling in this respect *Martin v. Nashville B. Asso.*, 2 Cold. 418); *Setliff v. North Nashville B. & S. Asso.*, (Tenn.) 39 S. W. Rep. 546.

¹⁹ *Bechtold v. Brehm*, 26 Pa. St. 269; *Kupfert v. Guttenberg B. Asso.*, 30 id. 465; *Philanthropic B. Asso. v. McKnight*, 35 id. 470; *Jarrett v. Cope*, 68 id. 67; *Link v. Germantown B. Asso.*, 89 id. 15. In *York Trust &c. Co. v. Gallatin*, 186 Pa. St. 150, the Pennsylvania Supreme Court seems to make no distinction between a regular building association loan, and what is known as a "definite payment" contract.

²⁰ *Jackson v. Cassidy*, 68 Tex. 282; 4 S. W. Rep. 541; *El Paso B. & L. Asso. v. Lane*, 81 Tex. 369; 17 S. W. Rep. 77; *Bexar &c. Asso. v. Robinson*, 78 Tex. 163; 14 S. W. Rep. 227; *Abbott v. Internat. B. & L. Asso.*, (Tex.) 25 id. 622; *Internat. B. & L. Asso. v. Biering*, id. 1132; *Bldg. Asso. v. Logan*, (Tex.) 33 S. W. Rep. 1088; *Nat. L. & Inv. Co. v. Stone*, (Tex.) 46 S. W. Rep. 67. But compare *Watson v. Aiken*, 55 Tex. 536.

²¹ *Mills v. Salisbury B. & L. Asso.*, 75 N. C. 292; *Latham v. Washington B. & L. Asso.*, 77 id. 145; *Overby v. Fayetteville B. & L. Asso.*, 81 id. 56. And see *Vann v. Fayetteville B. & L. Asso.*, 75 id. 494; *Hanner v. Greensboro B. & L. Asso.*, 78 id. 188; *Hoskins v. Mechanics' B. & L. Asso.*, 84 id. 838; *Smith v. Mechanics' B. & L. Asso.*, 73 id. 372; *Hollowell v. Southern B. & L. Asso.*, 120 id. 286; 26 S. E. Rep. 781. *Meroney v. Atlanta Nat. B. & L. Asso.*, 116 N. C. 922; 21 S. E. Rep. 924, was the case of a loan by a society which was held not properly to be a building association, a "quasi-building association," and therefore usurious.

²² *Columbia B. & L. Asso. v. Bollinger*, 12 Rich. Eq. 124; *Mechanics & Farmers' B. & L. Asso. v. Dorsey*, 15 S. C. 462; *Thompson v. Gillison*, 28 id. 534; 6 S. E. Rep. 333; *Pollock v. Carolina Interest B. & L. Asso.*, (S. C.) 29 S. E. Rep. 77.

²³ *Gordon v. Winchester B. & A. F.*

Nebraska,²⁴ and, it would seem, in Indiana,²⁵ Iowa,²⁶ and West Virginia.²⁷ As an out-and-out purchase, however, at a conventional price, of the borrower's shares by the association, involving a total cessation of his interest and membership in the same, and a total extinguishment of his stock, it is treated in Virginia,²⁸ and District of Columbia;²⁹ and as an extinguishment of his share, without destruction of membership,³⁰ in Michigan,³¹ and Mississippi.³²

§ 8774. **Incidents of such Loans: Usury.**— In spite of this apparent divergence of judicial views respecting the fundamental nature of the transaction, there is, as will be seen, considerable unanimity in the approval of divers doctrines which can logically be justified only upon the theory underlying the decisions embraced in the first group. The only important subject, indeed, upon which there is not a practical consensus is that of the application of the usury laws.³³ The extent to which these are held to

Asso., 12 Bush, 110; *Herbert v. Kenton B. & S. Asso.*, 11 id. 296; *W. S. S. & L. Asso. v. Scott*, 98 id. 695; 34 S. W. Rep. 235; *Mutual S. & L. Asso. v. Owings*, (Ky.) 43 S. W. Rep. 422. And see *Henderson B. & L. Asso. v. Johnson*, 88 Ky. 191; 10 S. W. Rep. 787.

²⁴ *Lincoln B. & S. Asso. v. Graham*, 7 Neb. 173; *Same v. Benjamin*, ib. 181; *Livingston L. & B. Asso. v. Drummond*, 49 id. 200; 68 N. W. Rep. 375.

²⁵ See *McLaughlin v. Citizens' B. L. & S. Asso.*, 62 Ind. 264; *Shaffrey v. Workmen's S., L. & B. Asso.*, 64 id. 600.

²⁶ See *Burlington Mut. L. Asso. v. Heider*, 55 Ia. 424, per *Seever*, J.; *Phillips v. Columbia City & C. Asso.*, 53 id. 719; 6 N. W. Rep. 121.

²⁷ *Pfeister v. Wheeling B. A.*, 19 W. Va. 676; *Parker v. U. S. B. & C. Asso.*, ib. 744; *Haigh v. Same*, ib. 792. And see *Archer v. Baltimore B. & L. Asso.*, (W. Va.) 30 S. E. Rep. 241.

²⁸ *White v. Mechanics' B. Asso.*, 22 Gratt. 233; *Winchester B. Asso. v. Gilbert*, 23 id. 787; *Cason v. Seldner*, 77 Va. 293.

²⁹ *Pabst v. B. Asso.*, 1 McArth. 385; *Mulloy v. Fifth Ward B. B. Asso.*, 2 id. 594. See also *Myers v. Schuyer*, 20 D. C. 254.

³⁰ It is not easy to conceive of such a thing.

³¹ *Michigan B. & S. Asso. v. Mc-*

Devitt, 43 N. W. Rep. 760. The decision proceeds entirely upon the statute, which speaks of the transaction as a "sale," and calls borrowers "selling" and investors "non-selling" members. It must be confessed that this is a pretty narrow ground for establishing such an absurdity as a membership without stock interest. Compare *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186.

³² *Sullivan v. Jackson B. & L. Asso.*, 70 Miss. 94; 12 So. Rep. 590.

³³ That, where the society's constitution provides that, on winding up, the rate of interest on the sum advanced shall not exceed lawful interest, there can be no question of usury: *Thompson v. Gillison*, 28 S. C. 534; 6 S. E. Rep. 333; and so, where the obligation stipulates for the retention by the society, on final settlement, of no more than the amount loaned with lawful interest: *Turner v. Interstate B. & L. Asso.*, 47 S. C. 397; 25 S. E. Rep. 278,—or where, though the borrower did not receive the whole face of his obligation, the balance was always ready for him: *Hammerslough v. Kansas City B., L. & C. Asso.*, 79 Mo. 80. That the entry of credit on an usurious obligation or sufficient to reduce the interest to the legal rate, with an agreement to take only legal interest thereafter and thus to regard the obligation as valid, will legalize it thereafter, see *Phillips v. Columbia*

apply,³⁴ depends, in a large measure, upon the view taken of the real nature of the transaction, and in turn determines, in any given case, the legality of the usual incidents of building association loans.³⁵ These are (1) stock payments, or dues, (2) interest, (3) premiums, (4) fines.³⁶

City &c. Asso., 53 Iowa, 719; 6 N. W. Rep. 121,—but to the contrary, *El Paso B. & L. Asso. v. Lane*, 81 Tex. 369; 17 S. W. Rep. 77. As to the right of a borrowing member to recover usury once paid, see, affirmatively, *Philanthropic B. Asso. v. McKnight*, 35 Pa. St. 470; *Build'g Asso. v. Ellsler*, 6 Phila. (Pa.) 6; *Bexar B. & L. Asso. v. Robinson*, 78 Tex. 163; 14 S. W. Rep. 227; *Hollowell v. Southern B. & L. Asso.*, 120 N. C. 286; 26 S. E. Rep. 781 (distinguishing *Latham v. Washington B. & L. Asso.*, 77 N. C. 145, and holding double amount of usury paid recoverable. And see *Smith v. Old Dominion B. & L. Asso.*, 119 N. C. 257; 26 S. E. Rep. 40, that the debt alleged to be usurious is a competent counterclaim in a suit to recover double usury paid; *Turner v. Interstate B. & L. Asso.*, (S. C.) 25 S. E. Rep. 278 (by assignee of stock pledged for an usurious loan); *Border State &c. Asso. v. Hilleary*, 68 Md. 52; *Same v. Hayes*, 61 id. 59;—and negatively, (in part turning upon the special features of the case, such as voluntary participation in fruits of usury exacted from others, settlement, with full knowledge of the facts, etc.); *Parker v. Fulton L. & B. Asso.*, 42 Ga. 451; *Haigh v. U. S. B. &c. Asso.*, 19 W. Va. 744; *Mills v. Salisbury B. & L. Asso.*, 75 N. C. 292; *Latham v. Washington B. & L. Asso.*, 77 id. 145; *Dickerson v. Raleigh Co. of L. & B. Asso.*, 89 id. 37; *Post v. Mechanics' B. & L. Asso.*, 97 Tenn. 408; 37 S. W. Rep. 216; *Starr S. & L. Asso. v. Woods*, (Tenn.) 42 S. W. Rep. 872; *Natchez B. & L. Asso. v. Shields*, 71 Miss. 630; 15 So. Rep. 793; *Bldg. & Loan Asso. of Jackson v. Leonard*, 54 Miss. 810; 21 So. Rep. 53. A substantial renewal, however, of an usurious obligation, is not a settlement: *Haigh v. U. S. B. &c. Asso.*, *supra*. Usurious interest merged in a judgment: *Schnepf's App.*, 47 Pa. St. 37; or collector or paid upon lawful process of execution cannot be recovered back: *Awat v. Eutaw B. Asso.*, 34

Md. 435. Suits for the recovery of usury must be brought within the time limited by statute: *Maule v. Build'g Asso.*, 5 Phila. (Pa.) 421. As to who can set up a defense of usury, see *Endl.*, B. A., §§ 374–378; *infra*, § 8782; *Kupfert v. Guttenberg B. Asso.*, 30 Pa. St. 465; *Hughes' App.* ib. 491; *Fisher v. Kahlman*, 3 Phila. (Pa.) 213; *Build'g Asso. v. O'Connor*, ib. 453; *Link v. Germantown B. Asso.*, 89 Pa. St. 15; *Nat. Premium B. & L. Asso. v. Seibert*, 178 id. 331; *People's Sav. Bk. & Bk. Asso. v. Collins*, 27 Conn. 145; *Stein v. Indianapolis B. L. F. & S. Asso.*, 18 Ind. 237; *Burlington Mut. L. Asso. v. Heider*, 52 Ia. 424; *Turner v. Interstate B. & L. Asso.*, (S. C.) 25 S. E. Rep. 278; *Nat. L. & Inv. Co. v. Stone*, (Tex.) 46 S. W. Rep. 67.

³⁴ As to the effect upon contracts usurious under the law as it stood when they were made, of later statutes, see *Kupfert v. Guttenberg B. Asso.*, 30 Pa. St. 465; *Hughes' App.*, ib. 471; *Crabtree v. Old Dominion B. & L. Asso.*, (Va.) 29 S. E. Rep. 741; *Smoot v. People's Perpet. L. & B. Asso.*, (Va.) ib. 746; *Bosang v. Iron Belt B. & L. Asso.*, (Va.) 30 S. E. Rep. 440.

³⁵ In general it has been held, that, a contract being ascertained to be usurious, the borrower is to be charged with the principal of the loan and legal interest, and credited with payments on account of the principal, interest, fines and penalties: *Rowland v. Old Dominion B. & L. Asso.*, 118 N. C. 173; 24 S. E. Rep. 366,—he being entitled to have all interest paid credited on the debt: *Internat. B. & L. Asso. v. Braden*, (Tex.) 32 S. W. Rep. 704,—but not membership fees: *Orenshaw v. Hedrick*, (Tex.) 47 id. 71,—and payment on the stock going to the holders thereof: *Rowland v. Old Dominion B. & L. Asso.*, *supra*.

³⁶ As to what the obligation may include, see *infra*, § 8781 and notes.

§ 8775. **Payments for Shares.**—It is a duty of every member, as has been seen, to pay dues until the stock matures, the society's existence is terminated, or the membership is brought to an end by lawful withdrawal.³⁷ When the member takes a loan, he practically anticipates what he may expect to be entitled to on the shares advanced at their maturity. The obligation, therefore, to confine his stock payments to that period³⁸ becomes absolute. It can no longer be optional with him to keep them up or not. He has received the ultimate fruits of his original undertaking, and is bound to carry it out.³⁹ The obligation and security, consequently, which he gives as a borrower, stipulates and stands for the observance of this duty, and the propriety of its so doing has, it seems, never been questioned.⁴⁰ Under the nomenclature of some statutes and associations, there is included under the term "dues" what would more properly be called redemption money, or simply interest; i. e., the periodical dues, per share, of the investing member being fixed at a certain figure, the same is, upon the grant to him of a loan, increased by another fixed amount, usually equivalent to interest, at the legal rate, upon the par value of the share, or upon the amount actually received by the borrower, accordingly as the statute or rules sanction the one or the other, the whole constituting a single payment.⁴¹

§ 8776. **Interest upon such Loans.**—In the absence of such arrangement, interest is a lawful incident to a loan; i. e., interest upon the amount actually paid to the borrower.⁴² As stock pay-

³⁷ See *supra*, § 8729, *et seq.*

³⁸ Compare *Lime City B., S. & L. Asso. v. Wagner*, 122 Ind. 78, where the by-laws provided for a set-off of the stock against the debt and extinction of the latter, in six years from the date of the incorporation, i. e., the loan.

³⁹ See *Endl. B. A.*, §§ 382-383.

⁴⁰ *Id.*, § 394. But the character and terms of the security, in this respect, in order to escape the taint of usury, must, it has been sometimes said, conform with the requirements of the statute under which the society is organized and with those of its own by-laws: *Massey v. Cit. B. & S. Asso.*, 22 Kan. 624; *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383; *Birmingham v. Maryland L. & T. Homestead Asso.*, 45 id. 541; *Hamil-*

ton B. Asso. v. Reynolds, 5 Duer (N. Y.) 671; *Franklin B. Asso. v. Mather*, 4 Abb. Pr. (N. Y.) 273. See *infra*, § 8781.

⁴¹ *Endl. B. A.*, § 384. Courts will, to prevent injustice, analyze the same and divide it into its constituent parts: See *Mills v. Salisbury B. & L. Asso.*, 75 N. C. 292; *Hanner v. Greensboro B. & L. Asso.*, 78 id. 188; *Ex parte Osborne*, in re Goldsmith, L. R. 10 Ch. App. 41; *Clarkville B. & L. Asso. v. Stephens*, 26 N. J. Eq. 351; *Oelano v. Wild*, 6 Allen (Mass.) 1. But a division by the association, for the purpose of imposing separate fines for non-payment of each, is inadmissible: *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383.

⁴² *Endl. B. A.*, §§ 385-388, 394-396. A statute allowing interest on the

ments are not, *ipso facto*, payments to, or in reduction of, the indebtedness,⁴³ the amount of the interest reserved does not vary from the date of the inception of the loan to that of its final discharge.⁴⁴ Payment of it may be required monthly or even weekly, under the rules of the society and the statutes governing.⁴⁵ Its running is not suspended by the bringing, or during the pendency, of a suit on the bond and mortgage of the borrower,⁴⁶ but by a lender.⁴⁷

§ 8777. **Fines for Non-Payment of Dues.**—The liability to fines, as has been seen,⁴⁸ is an incident of membership, and therefore, in

"loan": *Flounders v. Hawley*, 78 Pa. St. 45; on "loans advanced": *Forest City &c. Asso. v. Gallagher*, 25 Ohio St. 208; on "sum paid or advanced": *Balto. Perm. B. & L. Soc. v. Taylor*, 41 Md. 409; on "amount borrowed": *Oak Cottage B. Asso. v. Eastman*, 31 id. 409, allows it only on the sum actually paid the borrower. See also in denial of its right to reserve interest on premium: *Hawkeye Ben. & L. Asso. v. Blackburn*, 48 Ia. 385; *Burlington Mut. L. Asso. v. Heider*, 55 id. 424; *People's B. & L. Asso. v. McElroy*, 72 Miss. 441; 17 So. Rep. 348; *Gordon v. Winchester B. & A. F. Asso.*, 12 Bush (Ky.) 110; *Herbert v. Kenton B. & S. Asso.*, 11 id. 296; *Jackson v. Cassidy*, 68 Tex. 282; *Parker v. U. S. B. &c. Asso.*, 19 W. Va. 744; *Sullivan v. Jackson B. & L. Asso.*, 70 Miss. 94; 12 So. Rep. 590; *Goodman v. Durant B. & L. Asso.* (Miss.) 14 So. Rep. 146; but compare *Licking Co. Sav. L. & B. Asso. v. Bebout's Adm'r*, 29 Ohio St. 252. Under statutory authority, interest may be reserved on the nominal amount of the loan, i. e., the sum advanced and the premium bid, in Pennsylvania: *Build. Asso. v. Neurath*, 2 W. N. 95; *Build. Asso. v. George*, 3 id. 239; *Selden v. Reliable S. & B. Asso.*, 32 Sm. 336; in Missouri: Compare *Hammerslough v. Kansas City B. L. &c. Asso.*, 79 Mo. 80; in New Jersey: *Bowen v. Lincoln B. & L. Asso.*, 28 Atl. Rep. 67; and, it seems, in Minnesota: *Fitzgerald v. Hennepin Co. &c. Asso.*, 57 N. W. Rep. 1066; *New York Cit. Mut. &c. Asso. v. Webster*, 25 Barb. 263; Alabama: *Montgomery B. & L. Asso. v. Robinson*, 69 Ala. 413; and North Dakota: *Vermont L. & T. Co. v.*

Whithed, 49 N. W. Rep. 318. The reservation of interest upon the amount advanced, in excess of the legal rate, where interest is not chargeable on the premium, renders the transaction usurious: *Border State Perp. B. Asso. v. McCarthy*, 57 Md. 555; *Geiger v. Eighth Gen. B. Asso.*, 58 Md. 569; *Parker v. U. S. B. &c. Asso.*, 19 W. Va. 744; *Baker v. People's &c. Asso.*, 42 Ohio St. 655. And so when there is a combination of interest and expenses at a higher than the legal rate: *Waverly &c. Asso. v. Buck*, 64 Md. 338.

⁴³ See *infra*, § 8796.

⁴⁴ *Cit. Mut. L. & A. F. Asso. v. Webster*, 25 Barb. (N. Y.) 263; *City B. & L. Co. v. Fatty*, 1 Abb. App. Dec. (N. Y.) 347; *Red Bank Asso. v. Patterson*, 27 N. J. Eq. 223. See, however, the provision of the Ohio statute intended to lessen the amount of interest payable from year to year, discussed in *Seibel v. Vict. B. Asso.*, 43 Ohio St. 371.

⁴⁵ *Ibid.*

⁴⁶ *German Fair Hill B. Asso. v. Metzger*, 3 W. N. (Pa.) 204. Nor consequently, that of the period of grace allowed for payment of arrears: *ibid.* See also *Union B. & L. Asso. v. Masonic Hall Asso.*, 29 N. J. Eq. 389; and observe rule of computation given in *Robertson v. Amer. Homest. Asso.*, 10 Md. 397; *Cincinnati Germ. B. Asso. v. Flack*, (Cinc. Super. Ct.) 1 Rep. 468; *McCahan v. Columbian B. Asso.*, 40 Md. 226.

⁴⁷ *Columbian B. Asso. v. Crumb*, 42 Md. 192: an acceptance of which starts the running of interest, as if no tender had been made, until the money is finally paid: *ibid.*

⁴⁸ *Supra*, § 8720.

so far as it is legally established, properly embraced in the contract of a borrowing member with the association.⁴⁹ Fines, in building associations, instead of being treated as penalties or forfeitures,⁵⁰ ought to be regarded as liquidated damages for the breach of a member's undertaking to pay upon regular stated days — an undertaking whose faithful observance is essential to the success of the association⁵¹ — and as designed, not so much to punish the derelict member, as to make whole the faithful ones who suffer by his default.⁵² The power to impose them has frequently been declared to depend upon authority conferred by statute.⁵³ On principle, however, remembering the same nature of fines in building associations and their vital necessity to the prosperity of the enterprise, this cannot be true.⁵⁴ In any event, however, unless the statute undertakes to regulate them, their regulation belongs to the by-laws.⁵⁵ To be effective for this purpose, the by-law imposing a fine must be such, as regards clearness and precision, as to render it notorious and certain,⁵⁶ and as to creating it by unambiguous language.⁵⁷ Any ambiguity will be construed in favor of the member and against the association.⁵⁸ Moreover, the by-law must be a reasonable and equitable exercise of the power to impose fines.⁵⁹

⁴⁹ Endl., B. A., § 394.

⁵⁰ See to the contrary, i. e., that they are such penalties against which equity will relieve: *Mulloy v. Fifth Ward B. Asso.*, 2 McArth. (D. C.) 594.

⁵¹ Endl., B. A., §§ 412-417; *Build. & L. News*, March, 1889.

⁵² *Parker v. Butcher*, L. R. 3 Eq. 762; *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383; *Ocmulgee B. & L. Asso. v. Thomson*, 52 Ga. 427; *Goodman v. Durant B. & L. Asso.*, 71 Miss. 310; 14 So. Rep. 146; *Roberts v. Amer. B. & L. Asso.*, 52 Ark. 572; 36 S. W. Rep. 1085. See also *Thompson v. Hudson*, L. R. 2 Ch. App. 255; *Matterson v. Elderfield*, L. R. 4 Ch. App. 207.

⁵³ *Lincoln B. & L. Asso. v. Graham*, 7 Neb. 173; *Same v. Benjamin*, ib. 181; *Jarrett v. Cope*, 68 Pa. St. 67; *Rhoads v. Hoemerstown B. Asso.*, 82 id. 180; *Lank v. Germantown B. Asso.*, 89 id. 15.

⁵⁴ *Goodman v. Durant B. & L. Asso.*, *supra*; *Setliff v. North Nashville B. & S. Asso.*, (Tenn.) 39 S. W. Rep. 546; Endl., B. A., § 417.

⁵⁵ Endl., B. A., §§ 418-425. None can be collected unless imposed by charter or by law. *Build. Asso. v. Schuller*, 3 W. N. (Pa.) 431.

⁵⁶ Endl., B. A., §§ 418-421. Where the governing statute fixes a maximum rate of fines and the by-laws are silent on the subject, that rate may be enforced: *Harris B. & L. Asso. v. Simon*, 6 Pa. Dist. Rep. 204.

⁵⁷ *Occidental B. & L. Asso. v. Sullivan*, 62 Cal. 394.

⁵⁸ See *ibid.*; *In re Tierney*, 9 Ir. Rep., Eq., 1; 8 Ir. L. T. Rep. 29; *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383; *Monumental Perm. B. & L. Soc. v. Lewin*, 38 Md. 445; *Build. Asso. v. Schuller*, *supra*; *Dupuy v. Eastern B. & L. Asso.*, 93 Va. 460; 25 S. E. Rep. 537; *Three Towns British Mut. Dep. & Loan Soc. Lim. v. Doyle*, 13 Ct. B. (N. S.) (106 Engl. C. L. Rep.) 290; *Lovejoy v. Mulkarn*, 37 L. T. (N. S.) 77; 46 L. J., Ch. D. 630.

⁵⁹ Endl., B. A., §§ 422-425; *Lynn v. Freemansburg B. & L. Asso.*, 117 Pa. St. 1; *Hagerman v. Ohio B. & L. Asso.*, 25 Ohio St. 186.

Their proper measure is the actual damage the society suffers from the failure of a member to pay his dues or installments, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then obtainable premiums upon the sale of money.⁶⁰ The fine should be slightly in excess of this, so as to make it more profitable to the members to pay promptly than to lag behind.⁶¹ Where, indeed, the law or the rule of the society imposes, not a running percentage upon, but a fixed sum as a fine for default, the courts have usually construed the provisions to authorize but a single imposition of the penalty, and not a heaping of fines upon fines.⁶² Nor have they permitted the increase of the burden of fines standing against a member by a charge of interest thereon,⁶³ or tolerated the addition, from week to week, or from month to month, of a fixed sum, swelling the fine for the same default upon the principle of arithmetical progression.⁶⁴ Whilst the same considerations that make the prompt payment of dues a duty of prime importance to the prosperity of the society and justify the imposition of fines for its neglect, apply with equal force to the matter of interest payments by borrowers,⁶⁵ and therefore have very widely extended the system to it also,⁶⁶ yet the fact re-

⁶⁰ *Ocmulgee B. & L. Asso. v. Thomson*, 52 Ga. 427; *Lynn v. Freemansburg B. & L. Asso.*, *supra*.

⁶¹ *Lynn v. Freemansburg B. & L. Asso.*, *supra*, where it is intimated that a fine of from 1 to 2 per cent. per month would, in nearly all cases, be sufficient and just. Compare *Re Middleborough B. Soc.*, 54 L. J. Ch. Div. 592, where it was 5 per cent.; and *McGannon v. Centr. B. Asso.*, 19 W. Va. 726, where the fine was 10 cents for failure to pay dues of 25 cents.

⁶² See *Three Towns & Co. Soc. v. Doyle*, 7 L. T. (N. S.) 276. In *re Tierney*, 9 Ir. Rep. Eq. 1; *Shannon v. Howard Mut. Asso.*, 36 Md. 383; *Monumental Perm. B. & L. Soc. v. Lewin*, 38 id. 445; *Build. Asso. v. Schuller*, 3 W. N. (Pa.) 431; *Hagerman v. Ohio B. & L. Asso.*, 25 Ohio St. 186; *McGannon v. Centr. B. Asso.*, 19 W. Va. 726; *Gouckenour v. Sullivan B. & L. Asso.*, 119 Ind. 441; 21 N. E. Rep. 1088. But see *James D. Howley B. Asso. v. Taylor*, 39 Leg. Int. (Pa.) 412.

⁶³ *Parker v. Butcher*, L. R. 3 Eq. 762. See *Endl.*, B. A., § 430. But af-

ter decree of foreclosure ascertaining the whole amount due on a mortgage, including fines, the latter forms part of the principal bearing interest: *Provident B. Soc. v. Greenhill*, L. R. 9 Ch. D. 122; 38 L. T. Rep. (N. S.) 140.

⁶⁴ *Lovejoy v. Mulkarn*, 37 L. T. (N. S.) 77; 46 L. J. Ch. D. 630; *Sec. N. Y. B. Asso. v. Gallier* (cited), 25 Barb. (N. Y.) 263; *Lynn v. Freemansburg B. & L. Asso.*, 117 Pa. St. 1; *Dupuy v. Eastern B. & L. Asso.*, 93 Va. 460; 25 S. E. Rep. 537. But compare *James D. Howley B. Asso. v. Taylor*, 39 Leg. Int. (Pa.) 412; *Re Middleborough B. Soc.*, 54 L. J. Ch. Div. 592.

⁶⁵ See *Endl.*, B. A., §§ 427-429.

⁶⁶ See *ibid.*, § 429; *Gouckenour v. Sullivan B. & L. Asso.*, 119 Ind. 441; 21 N. E. Rep. 1088; *Bowen v. Lincoln B. & L. Asso.*, (N. J.) 28 Atl. Rep. 67; *Parker v. Butcher*, L. R. 8 Eq. 762; In *re Middleborough B. Soc.*, 54 L. J. Ch. Div. 592; and see *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383; *Clarkville B. Asso. v. Stephens*, 26 N. J. Eq. 351; *Ocmulgee B. & L. Asso. v. Thomson*, 52 Ga. 427; *Lynn*

mains that primarily the liability to fines is predicated upon the membership relation,⁶⁷ and that there is respectable authority in this country restricting the right to impose fines to the enforcement of membership duties and disapproving later impositions for defaults in the payment of interest, unless expressly authorized by statute.⁶⁸

§ 8778. **Further of such Fines.**—In so far as fines in a building are lawful, submission to them is an essential part of the contract of loan.⁶⁹ But whilst for that reason it is proper in the obligation to include a covenant for their payment, they are ordinarily mere personal debts of the shareholder and do not become a part of his mortgage debt unless expressly made so by the terms of the instrument, or unless under the constitution or the by-laws, sufficiently referred to in it, they are collectible out of the proceeds of the sale of property mortgaged to the society.⁷⁰ It has been said that a covenant to pay “all fines imposed by the articles of association” does not make the latter a part of the mortgage, or authorize the court to consider them in construing it.⁷¹ On the other hand, it has been held, that, where the rules of a building association expressly provide for fines and direct that mortgages given to it shall secure them, and a mortgage authorizes a sale for failure to observe the by-laws, there may be a sale under it for default in payment of

v. Freemansburg B. & L. Asso., *supra*. But, in *Smith v. Old Dominion B. & L. Asso.*, 119 N. C. 257; 26 S. E. Rep. 40, and *Meroney v. Atlanta Nat. B. & L. Asso.*, 116 N. C. 922; 24 S. E. Rep. 924, it is held that such fines are simply interest, and if by means thereof the association exacts more than lawful interest, usurious. Where dues and interest are lumped in one sum: see *supra*, § 8775, and form a single debt, the same cannot be divided into its constituent elements and a separate fine imposed for default as to each: *Shannon v. How. Mut. B. Asso.*, *supra*.

⁶⁷ *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186.

⁶⁸ *Ibid.*: *Forest City &c. Asso. v. Gallagher*, *ib.* 208; *Parker v. U. S. B. &c. Asso.*, 19 W. Va. 744, and see *Shannon v. How. Mut. B. Asso.*, *supra*.

⁶⁹ *Endl. B. A.*, §§ 415-416; *Shan-*

non v. Howard Mut. B. Asso., 36 Md. 383. So that a wife's mortgage to secure her husband's obligation to the society stands for fines incurred by him: *Juniata B. & L. Asso. v. Mixell*, 84 Pa. St. 313; see also *Massey v. Cit. B. & L. Asso.*, 22 Kan. 624; *Relief Sav. F. Asso. v. Longshore*, 8 Luz. Leg. Reg. (Pa.) 199; though, under the state of the law at the time, her mortgage for her own debt could bind her only for the amount actually advanced, with interest: *Wolbach v. Lehigh B. Asso.*, 84 Pa. St. 211.

⁷⁰ *Bowen v. Lincoln B. & L. Asso.*, 51 N. J. Eq. 272; 28 Atl. Rep. 67; *Build. Asso. v. Goldbeck*, 17 Phila. (Pa.) 242.

⁷¹ *Robertson v. Amer. Homest. Asso.*, 10 Md. 397. Compare *McCahan v. Columbian B. Asso.*, 40 id. 226. But see *Endl. B. A.*, § 443, and *infra*, § 8781.

finer.⁷² And even where the mortgage makes no mention whatever of fines, or of the borrower's liability to pay such, he, having paid them, can claim no credit for them upon his debt.⁷³ Whatever fines, however, an association, under the statute governing the case, is found to have no right to exact, are illegal, and no provision for them in the by-laws can be enforced upon the theory that the member's submission to the rules establishes the measure of fines appointed by them as conventional between himself and the association.⁷⁴ And if he pays them, he may subsequently defalc the amount from the claim of the association against him.⁷⁵ When the society exercises its option to declare a member's debt due, it has been said that fines cease in respect of it, and after commencement of suit for recovery of the debt, the society can assess no further fines.⁷⁶ But this may be regarded as a doubtful point.⁷⁷ Where, however, the failure or delay of payment by the borrower is caused by excessive demands on the part of the society, the imposition of fines for such delay, etc., will not be allowed.⁷⁸

§ 8779. Premiums Bid to Secure such Loans.—The most characteristic incident of a building association loan, and one whose legality, apart from statutory sanction, wholly depends upon the proper understanding of the transaction,⁷⁹ is the premium. When a member of the association wishes to loan money from it, he bids in competition with others desiring similar accommodation, for the preference, and the loan is awarded to the highest bidder. The amount bid by him is called the premium.⁸⁰ There are substantially two methods, slightly varying in detail of form, in use among building associations for discharging the premium: (1) The gross amount of the premium is charged against the borrower, who re-

⁷² *Setliff v. North Nashville B. & S. Asso.*, (Tenn.) 39 S. W. Rep. 546.

⁷³ *Clarkville B. & L. Asso. v. Stephens*, 26 N. J. Eq. 351. See also *Selden v. Reliable S. & B. Asso.*, 32 Sm. (Pa.) 336.

⁷⁴ *Hagerman v. Ohio B. & S. Asso.*, 25 Ohio St. 186.

⁷⁵ *Lynn v. Freemansburg B. & L. Asso.*, 117 Pa. St. 1.

⁷⁶ *Murphy v. Goodland B. & L. Asso.*, 2 Kan. App. 330; 43 Pac. Rep. 863.

⁷⁷ See *German Fair Hill B. A. v. Metzger*, 3 W. N. (Pa.) 204; *Union B. & L. Asso. v. Masonic Hall Asso.*,

29 N. J. Eq. 389; *Endl.*, B. A., § 388.

⁷⁸ *Hughes v. Farmers' S. & B. & L. Asso.*, (Tenn.) 46 S. W. Rep. 362.

⁷⁹ *Supra*, §§ 8772-8774.

⁸⁰ The basis of this bid is generally the par value of the shares. But the society may estop itself by its course of dealing with the borrower from denying that a gross premium bid in the shape of a percentage is to be computed upon the amount actually advanced, and not upon the par value of the shares: *Mut. B. & L. Asso. v. Tascott*, 143 Ill. 305; 32 N. E. Rep. 376; 40 Am. & Engl. C. C. 361.

ceives the nominal amount of the loan, less the premium bid, while giving his obligations for the former, thus binding himself, formally, to pay both the sum actually advanced to him and the premium bid; or (2) the premium is offered in its shape of percentage, to be added to the periodical payments, or as increased interest, and thus its payment distributed over the whole period of repayment of the loan, and discharged in instalments, the periodical payments thus augmented being secured by the obligation. The essential nature and purpose of the premium are the same in both of these systems, and their practical operation substantially alike.⁸¹ In neither case is the premium prepaid; the borrower simply promises to pay it.⁸² Nor, for any purpose except that of computing under the gross system the amount actually receivable by the borrower,⁸³ can it be regarded as a deduction of money either belonging to him in the hands of the society, or of funds which he was presently entitled to receive; for, at the time, he has nothing in it but a prospective interest in its final accumulations proportionate to the number of his shares.⁸⁴ Except where the premium consists simply in an increased rate of interest, it is not contemplated that it shall be paid, dollar for dollar, by the borrower, in strict conformity with the letter of his undertaking. All he is bound to do is to pay the periodical amounts coming due upon his obligation, and to continue doing so until the shares of the society or series to which he belongs have reached maturity: then his debt and his premium bid are both discharged by relinquishing to the association his credit in the same. Unless the society is unfortunate, this period will be reached a considerable time before the borrower's payments, with interest, shall amount to the aggregate of what he received, with interest, together with what he promised to pay by way of premium. The

⁸¹ But where a building association is, by statute or charter, authorized to operate upon the one system, it cannot adopt the other without making the contract unlawful to the extent that the reservation exceeds the legal rate of interest: *Birmingham v. Maryland L. & T. Homest. Asso.*, 45 Md. 541; *Mechanics & Workingmen's Mut. Sav. Bank & B. Asso. v. Wilcox*, 24 Conn. 147; *Same v. Meriden Agency Co.*, ib. 159.

⁸² *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 514; *Sullivan v. Jackson B. & L. Asso.*, 70 Miss. 94; 12 So. Rep. 590, both referring to

gross premiums. The correctness of the statement as to installment premiums requires no elucidation.

⁸³ See Endl., B. A., § 402.

⁸⁴ Id., §§ 400-402. Because the premium is neither a prepayment nor a deduction, gross premiums bid for loans are not presently *earnings* of the society from which a dividend may be declared. *Marks v. Monroe P. S. & L. Asso.*, 52 N. Y. St. Rep. 451. But see, *contra*, *Boone v. Homest. L. Asso.*, 23 N. Y. Supp. 203. Compare the inaccurate description of the transaction in this case in *Low Str. B. Asso. v. Zucker*, 48 Md. 448.

period for ascertaining the amount of the premium actually paid by the borrower is the date of the maturity of the shares and distribution of the assets.⁸⁵

§ 8780. Further as to such Premiums.—From a proper understanding of the nature and office of the premium, flows the principle, not only that it must be the result of a competitive bidding, not of mere agreement between the parties⁸⁶ but of free competition among members bidding for the loan,⁸⁷ as well as that which, ordinarily,⁸⁸ forbids the inclusion of the premium bid as a basis for the charge of interest.⁸⁹ Within the limits indicated, and proceeding either upon the basis of the peculiar nature of the transaction, or upon that of express statutory sanction, the legality of the premium resulting from free competition, and the right of the association to recover it, are almost universally conceded,⁹⁰ the only exceptions, it

⁸⁵ *Forest City &c. B. Asso. v. Gallagher*, 25 Ohio St. 208, 215; and see *Watkins v. Workingm. B. & L. Asso.*, 97 Pa. St. 514, 524.

⁸⁶ *Bates v. People's &c. Asso.*, 42 Ohio St. 655. But see *New Jersey B. & S. Co. v. Bachelor*, 54 N. J. Eq. 600; 35 Atl. Rep. 745, (citing *Clarkville B. & L. Asso. v. Stephens*, 26 N. J. Eq. 351,) that bidding is not essential to the validity of a loan at a premium. Certainly, the borrowers need not bid in person, written bids filed with the secretary being sufficient: *Hughes v. Farmers' S., B. & L. Asso.*, (Tenn.) 46 S. W. Rep. 362.

⁸⁷ *Supra*, § 8726.

⁸⁸ See *supra*, § 8776, note.

⁸⁹ See *Endl.*, B. A., §§ 403-404.

⁹⁰ *Silver v. Barnes*, 6 Bing. N. C. 180; 37 Engl. C. L. Rep. 335; *Burbridge v. Cotton*, 5 De G. & Sm. 17; 8 Eng. L. & Eq. 57; *Seagrave v. Pope*, 1 De G., M. & G. 783; 15 Engl. L. & Eq. Rep. 477; *Cutbill v. Kingdom*, 1 Exch. 494; *In re Durham Co. Perm. Ben. B. So.*, L. R. 12 Eq. 516; *Selden v. Reliable S. & B. Asso.*, 32 Sm. (Pa.) 336; *Jarrett v. Cope*, 68 Pa. St. 67; *Johnston v. Elizabeth B. & L. Asso.*, 104 id. 394; *Delaware B. Asso. v. Keller*, 2 W. N. (Pa.) 29; *Relief Sav. F. Asso. v. Longshore*, 8 Luz. Leg. Reg. (Pa.) 199; *Franklin B. Asso. v. Marsh*, 29 N. J. L. 225; *Hoboken B. Asso. v.*

Martin, 13 N. J. Eq. 428; *Somerset Co. B., L. & S. Asso. v. Canman*, 11 id. 282; *Red Bank Asso. v. Patterson*, 27 id. 223; *Clarkville B. & L. Asso. v. Stephens*, 26 id. 351; *New Jersey B., L. & Sav. Co. v. Bachelor*, 54 id. 600; 35 Atl. Rep. 745 (the mortgage being good, as to the premium included in it, as against subsequent incumbrancers); *Cit. Mut. L. & A. F. Asso. v. Webster*, 25 Barb. (N. Y.) 263; *City B. & L. Co. v. Fatty*, 1 Abb. App. Dec. (N. Y.) 347; *Concordia S. & A. Asso. v. Read*, 93 N. Y. 474; *West Winsted S. Bk. & B. Asso. v. Ford*, 27 Conn. 282; *Same v. Rice*, ib. 293; *People's S. Bk. & B. Asso. v. Collins*, ib. 145; *Forest City, &c. B. Asso. v. Gallagher*, 25 Ohio St. 208; *Hagerman v. Ohio B. & S. Asso.*, ib. 186; *Licking Co. S., L. & B. Asso. v. Bebout's Adm'r*, 29 id. 252; *Bates v. People's &c. Asso.*, 42 id. 655; *Robertson v. American Homest. Asso.*, 10 Md. 397; *Shannon v. Howard Mut. B. Asso.*, 36 id. 383; (*Compare Geiger v. Eighth Germ. B. Asso.*, 58 id. 569; *Border State &c. Asso. v. Hayes*, 61 id. 597; *Same v. Hillsary*, 68 id. 52;) *Delano v. Wild*, 6 Allen (Mass.) 1; *Bowker v. Mill River L. T. Asso.*, 7 id. 100; *Merrill v. McIntire*, 13 Gray (Mass.) 157; *Barker v. Bigelow*, 15 id. 130; *Shannon v. Dunn*, 43 N. H. 194; *Hawkeye Ben. & L. Asso. v. Blackburn*, 48 Ia. 385;

seems, being in Kentucky,⁹¹ North Carolina,⁹² South Carolina,⁹³ and Texas.⁹⁴ But a premium which is the result of a rule fixing a minimum below which no bid will be received, is not within this principle, and its inclusion in the contract as something to be paid is regarded as usurious.⁹⁵ Moreover, it has been the understanding that the reservation of a premium is lawful only in what is properly termed a building association loan, (i. e., one which is virtually an advancement upon the stock, and the extent of the borrower's liability upon which is not ascertainable at its inception)⁹⁶ and that it is not lawful in what is known as "definite payment" contracts, i. e., such as provide for cancellation upon the payment of a presently ascertained, definite amount, though spread, in installments, over a period of years.⁹⁷

Burlington Mut. L. Asso. v. Heider, 52 id. 424; Massey v. Cit. B. & S. Asso., 22 Kan. 624; Salina B. & S. T. Asso. v. Nelson, ib. 751; Malloy v. Fifth Ward B. Asso., 2 McArth. (D. C.) 594; Pabst v. Economical B. Asso., 1 id. 385; White v. Mechanics' B. Asso., 22 Gratt. (Va.) 233; Winchester B. Asso. v. Gilbert, 23 id. 787; Cason v. Seldner, 77 Va. 293; Pfeister v. Wheeling B. Asso., 19 W. Va. 676; Parker v. U. S. B. & C. Asso., id. 744; McLaughlin v. Cit. B. L. & S. Asso., 62 Ind. 264; Shaffrey v. Workingmen's S., L. & B. Asso., 64 id. 600; Bibb Co. L. Asso. v. Richards, 21 Ga. 592; Parker v. Fulton L. & B. Asso., 46 id. 166; Van Pelt v. Home B. & L. Asso., 79 id. 439; Patterson v. Workingmen's B. & L. Asso., 14 Lea (Tenn.) 677 (overruling in this respect, Martin v. Nashville B. Asso., 2 Cold. 418); Setliff v. North Nashville B. & L. Asso., (Tenn.) 39 S. W. Rep. 546; Vermont L. & T. Co. v. Whithed, 2 N. D. 82; 49 N. W. Rep. 318; Amer. Homest. Co. v. Linigan, 46 La. An. 118; 15 So. Rep. 369; Reeve v. Ladies & C. Asso., 56 Ark. 335; 19 S. W. Rep. 917; Taylor v. Van Buren B. & L. Asso., 56 Ark. 340; 19 S. W. Rep. 918; Tilley v. Amer. B. & L. Asso., 52 Fed. Rep. 618; Montgomery & C. Asso. v. Robinson, 69 Ala. 413; Security & C. Asso. v. Lake, id. 456; Holmes v. Smythe, 100 Ill. 413; Freeman v. Ottawa & C. B. Asso., 114 id. 182; Winget v. Quincy B. & L. Asso., 128 id. 67; Mut. B. & L. Asso. v. Tascott, 143 Ill. 305; 32 N. E. Rep. 376;

Fagan v. People's S. & L. Asso., 55 Minn. 437; 57 N. W. Rep. 142; Michigan B. & S. Asso. v. McDevitt, 77 Mich. 1; 43 N. W. Rep. 760; Sullivan v. Jackson B. & L. Asso., 70 Miss. 94; 12 So. Rep. 590; Livingston L. & B. Asso. v. Drummond, 49 Neb. 200; 68 N. W. Rep. 375.

⁹¹ See Gordon v. Winchester B. & A. F. Asso., 12 Bush. 110; Herbert v. Kenton B. & L. Asso., 11 id. 296; Henderson B. & L. Asso. v. Johnson, 88 Ky. 191; 10 S. W. Rep. 787.

⁹² See Mills v. Salisbury B. & L. Asso., 75 N. C. 292; Latham v. Washington B. & L. Asso., 77 id. 145; Vann v. Fayetteville B. & L. Asso., 75 id. 494; Hanner v. Greensboro B. & L. Asso., 78 id. 188; Overby v. Fayetteville B. Asso., 81 id. 56; but compare Smith v. Mechanics' B. & L. Asso., 73 id. 372.

⁹³ Columbia B. & L. Asso. v. Bolinger, 12 Rich. Eq. 124; Mechanics & C. Asso. v. Dorsey, 15 S. C. 462; Thompson v. Gillison, 28 id. 534; 6 S. E. Rep. 333.

⁹⁴ Jackson v. Cassidy, 68 Tex. 282; 4 S. W. Rep. 541; El Paso B. & L. Asso. v. Lane, 81 Tex. 369; 17 S. W. Rep. 77; Bexar & C. Asso. v. Robinson, 78 Tex. 163; 14 S. W. Rep. 227; Abbott v. Internat. B. & L. Asso., 25 S. W. Rep. 622; Internat. B. & L. Asso. v. Mayers, id. 1132. See on this subject also, *ante*, § 8772.

⁹⁵ Myers v. Alpena L. & B. Asso., (Mich.) 75 N. W. Rep. 944.

⁹⁶ See *ante*, § 8772.

⁹⁷ See Birmingham v. Maryland

§ 8781. **Mortgage Security for such Loans.**—The power to make loans to members with the reservations referred to involves the right to take mortgage security for the performance of the contract.⁹⁸ Such mortgage is a security for the payment of money only within the statute,⁹⁹ and operative only so far as authorized by it and by the by-laws of the association, and in conformity therewith.¹⁰⁰ Hence, as no reservation inserted in it, which is not contemplated by statute and by-law, can be enforced under it,¹⁰¹ so, on the other hand, if the loan was, in fact, a building association loan, no mere form of the instrument will deprive it of its character, incidents and privileges as such.¹⁰² On the question of its validity, therefore, and

Land & Perm. Homest. Asso., 45 Md. 541. Compare, however, *York &c. Co. v. Gallatin*, 186 Pa. St. 150, where such a contract was allowed to include a premium, and also *Pioneer S. & L. Co. v. Kasper*, (Kan.) 52 Pac. Rep. 623.

⁹⁸ *Massey v. Cit. B. & L. Asso.*, 22 Kan. 624. The mortgage may be upon leasehold property: *Sheffield &c. B. Soc'y v. Aizlewood*, L. R. 44 Ch. Div. 412; *Seagrave v. Pope*, 1 DeG., M. & G. 783; 15 Engl. L. & Eq. Rep. 477; or chattels: see *Bismarck B. & L. Asso. v. Bolster*, 92 Pa. St. 123; and upon equitable title: see *Lincoln B. & L. Asso. v. Haas*, 10 Neb. 581; upon property of a stranger to the association as well as of a member: *Supra*, § 8759, note. The bond given by the member is the debt; the mortgage secures it: See *Eagle Benef. Socy's App.*, 75 Pa. St. 226. It is held, that a building association may assign as member's mortgage in payment of, or as collateral for a debt, e. g., a claim of a withdrawing member: *Quain v. Smith*, 108 Pa. St. 375, or for a loan to pay off holders of stock in a matured series: *North Hudson M. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31; 47 N. W. Rep. 300; 11 L. R. A. 845. See also *Munhall v. Boedecker*, 44 Ill. App. 131; *Murray v. Scott*, 9 App. Cas. 519. Whatever rights the mortgagor had in respect of payment of the mortgage remains to him unchanged: *Endl., B. A.*, § 455.

⁹⁹ *Franklin B. Asso. v. Mather*, 4 Abb. Pr. (N. Y.) 273.

¹⁰⁰ *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383.

¹⁰¹ *Ibid.*; *Hagerman v. Ohio B. & L. Asso.*, 25 Ohio St. 186; *Build. Asso. v. Schuller*, 3 W. N. (Pa.) 431; and see *Smith v. Mechanics' B. & L. Asso.*, 73 N. C. 372; *Balto. Perm. B. & L. Soc. v. Taylor*, 41 Md. 409; *Birmingham v. Maryland L. & P. H. Asso.*, 45 id. 541. It is generally conceded, however, to be proper to include stipulations for the payment of ground-rent, taxes, insurance and similar charges: *Robertson v. Amer. Homest. Asso.*, 10 Md. 397; *Hanner v. Greensboro B. & L. Asso.*, 78 N. C. 188; *Overby v. Fayetteville B. & L. Asso.*, 81 id. 56; *Huntington &c. Asso. v. Melsheimer*, 14 W. N. (Pa.) 344. A stipulation that, on default in payment of dues, etc., the whole debt secured, with interest, fines, etc., shall be forthwith collectible, is not a penalty against which equity will relieve: *Concordia S. & A. Asso. v. Read*, 93 N. Y. 474. But see *Fagan v. People's S. & L. Asso.*, 55 Minn. 437; 57 N. W. Rep. 142, where such a stipulation was referred to as showing that the transaction was not properly a building association loan.

¹⁰² *Building Asso. v. Robinson*, 46 Leg. Int. (Pa.) 5. Though the borrower's obligation binds him, in case of failure to comply with its conditions, to payment of a penal sum, nothing more can be collected than what is really due by him: *Dart v. Southwest B. & L. Asso.*, 99 Ga. 794; 27 S. E. Rep. 171. See, however, *York Trust &c. Co. v. Gallatin*, 186 Pa. St. 150, for a strict and liberal construction which made the contract a definite payment contract governed by its ex-

its relation to the usury laws, the form of the mortgage is not decisive.¹⁰³ It must be read and construed in the light of the actual facts of the case, and with reference to the constitution and by-laws of the association and the statute under which it is incorporated.¹⁰⁴ As a result, the full and detailed elements of the contract, even so far as the borrower is concerned, are rarely, if ever, specified in his mortgage.¹⁰⁵ There are principally three classes of mortgages used in building associations, any particular one being adopted accordingly as the intention of the framers of the governing statute or by-law seems best served by its peculiar form: (1) That in which the fact of an advancement upon, or redemption of, shares is recited, and the condition calls for regular stock payments of fixed amounts, and performance of membership duties and liabilities generally, together with the payment of redemption money or interest on the amount advanced (this item being frequently lumped together with the stock payments under the name of dues) to the end of the society's existence; (2) that in which, in addition, the sum advanced is made repayable, (3) that in which the nominal amount of the loan, the par value of the shares advanced, thus including the premium, is made payable, with interest (upon that whole sum, or only upon the actual advance, accordingly as the one

press terms and relieved the borrower from liabilities which otherwise attach to members who become borrowers. See also *Interstate S. & L. Asso. v. Cairns*, 16 Wash. 215; 47 Pac. Rep. 509.

¹⁰³ *Ibid.*

¹⁰⁴ *Endl., B. A., §§ 435, 442-443.* *Robertson v. Amer. Homest. Asso.*, 10 Md. 397, is to the contrary. But that decision is sufficiently explained by *McCahan v. Columbian B. Asso.*, 40 id. 226, 234-236, which decides, that, where, by proper reference, the mortgage incorporates the rules of the society, it is construed with reference to the same. To the same effect is *Lime City B., S. & L. Asso. v. Wagner*, 122 Ind. 689 (where, the by-laws declaring that all loans should be due in six years from the date of incorporation, or on the maturity of the stock, and that, in either case, the borrower's stock should then be set off against and extinguish his debt, and the borrower's obligation referring to the by-laws and making them part

of the contract, his liability upon it was held at an end at the expiration of six years from the loan); and *Wilson v. Schoenlaub*, (Mo.) 12 S. W. Rep. 361 (where, a borrower having given his note, secured by trust deed, authorizing sale on default in monthly and weekly payments, the latter was held to refer to the stock payments required by the rules). Of course, the transaction must be a lawful one in order to be privileged as a building association loan: and therefore a director of such a society, giving an ordinary bond and mortgage, with a secret understanding with his fellows that it was to be paid by his stock, will be held to its liberal terms: *Pangborn v. Citiz. & C. Asso.*, 35 N. J. Eq. 341. Where the loan is not properly a building association loan, no obligation is incurred by the mortgagor except by the covenants of his mortgage: *Commercial B. & L. Asso. v. Mackenzie*, 85 Md. 132; 36 Atl. Rep. 754.

¹⁰⁵ See *Build. & L. News*, Feb., 1889.

or the other may be lawful), stock payments, etc., being stipulated for as in the other cases. Each of these forms covers a greater or lesser portion of one of the same contract between the society and its borrowing member, and read in the light of the constituent elements of that contract,¹⁰⁶ and of the statute, and charter and by-law provisions governing the same, all of them, in their practical effect, are substantially the same.¹⁰⁷ It has been held that a building association may assign the mortgages taken by it from its members, as collateral security for money borrowed by it,¹⁰⁸ or in payment of or as collateral for the claims of withdrawing members.¹⁰⁹ But where the governing statute requires the deposit of these securities in trust for members and creditors, and allows them to be withdrawn only on payment (for cancellation) or on default (for the purpose of foreclosure), the society cannot sell them.¹¹⁰ And even assuming the validity of a transfer of a mortgage held by a building association, a power of sale given therein to "the trustees or trustee for the time being of the society," has been held incapable of being exercised by the transferee, who, consequently, could make no title to the property under the mortgage.¹¹¹ Nor can it be doubtful, that, where one building association transfers its loans to another, the effect is a continuation of the borrowers' original contracts in the hands of the transferee, and the borrowers are entitled to credit, with the new association upon their loans, for the payments made to the first association.¹¹²

§ 8782. Remedies against One who Purchases Subject to such a Mortgage.—A building association, mortgagee, may, if it pleases, exercise all the powers that are given it concurrently.¹¹³ A purchaser subject to a building association mortgage, who took the forfeited shares of the defaulting borrower, agreeing to pay part of the purchase money by installments of a certain amount, was subsequently held liable under the rules of the society (authorizing sales

¹⁰⁶ *Supra*, §§ 8772-8774.

¹⁰⁷ See *Endl.*, B. A., §§ 436-438.

¹⁰⁸ *North Hudson Mut. B. & L. Asso. v. First Nat. Bank*, 79 Wis. 31; 47 N. W. Rep. 300.

¹⁰⁹ *Quein v. Smith*, 108 Pa. St. 325.

¹¹⁰ *Trowbridge v. Hamilton*, (Wash.) 52 Pac. Rep. 328.

¹¹¹ *In re Rumney v. Smith*, [1897] 2 Ch. 351. Nor can the society prosecute a suit pending at the time of the

transfer on an obligation embraced therein: *Home B. & L. Asso. v. Van Pelt*, 94 Ga. 615; 21 S. E. Rep. 606,—at least, where the transaction amounts to a virtual dissolution. As to the right of the society's assignee, see *infra*, § 8796, note.

¹¹² *Neal v. New South B. & L. Asso.*, (Tenn.) 46 S. W. Rep. 755.

¹¹³ *Id.*, §§ 393, 453.

upon such terms) to fines for non-payment of the installments.¹¹⁴ But one who purchased property on which a building association held a deed of trust, agreeing to pay off the debt due the same at the rate of \$40 per month, was, it was held, not to be treated as a member of the association.¹¹⁵

§ 8783. For what Purposes such Mortgages are Assets.—Representing funds actually accumulated and obligations to pay something distinct from the mere stock contributions, the mortgages held by a building association are assets for the purposes of taxation;¹¹⁶ but, not being available for presently realizing a fund to pay off unadvanced shares, but only as an eventual set-off against the stock on which they were advanced, they are not assets for the pur-

¹¹⁴ *Handley v. Farmer*, 29 Beav. 362. A building association mortgage is good, as against a subsequent incumbrancer, for the premium included in it: *New Jersey B. L. & Inv. Co. v. Bachelor*, 54 N. J. Eq. 600; 35 Atl. Rep. 745. As to the right of a vendor subject to such a mortgage to set up the defense of usury, see *ante*, § 8774. See also *Sawtelle v. North Amer. S., L. & B. Co.*, 14 Utah, 443; 48 Pac. Rep. 211, that a vendee of property subject to a mortgage to a building association has the right to claim credit for the value of the entire stock interest of his vendor as it appears to be, although, unknown to such vendee, the vendor had absolutely transferred a certain number of his shares to the society.

¹¹⁵ *Capitol Hill B. Asso. v. Hilton*, 1 Mackey (D. C.) 107. Where the mortgage, while purporting to be on the fee simple, was only upon the equitable title, it was held not defeated by a subsequent purchaser of the fee who procured a quitclaim deed from the holder of the equitable title: *Lincoln B. & S. Asso. v. Haas*, 10 Neb. 581. See s. c. as to effect of mistake of clerk in entering description of premises on numerical index. And see, as to effect of omission in mortgage to name the person authorized to sell: *Queen City Perpet. B. Asso. v. Price*, 53 Md. 397; *Frostburg Mut. B. Asso. v. Lowdermilk*, 50 id. 175.

¹¹⁶ *State v. Hornbacker*, 41 N. J. L.

519; 42 id. 635, no matter whether the transaction be regarded as constituting technically a loan or an advance, whether the bonds and mortgages secured the repayment of the principal sum, or the performance of a collateral duty: *ibid.* See also *State v. Redwood Falls B. & L. Asso.*, 45 Minn. 154; 57 N. W. Rep. 540; 10 L. R. A. 752. Where the Constitution of the state requires all corporations, except those formed for benevolent, religious, scientific or educational purposes, to pay an incorporation tax, the legislature cannot exempt building associations: *State v. McGrath*, 95 Mo. 193. But in the absence of such restriction, the legislature may, as against all public officers, as well as against a county, release from taxation the notes and mortgages given by members of such associations to them, and remit such taxes already made but not yet collected: *Selma B. & L. Asso. v. Morgan*, 57 Ala. 33. In England, the provisions of the statute exempting from stamp duty bonds, securities and assurances given on account of any friendly society, was held to extend to building associations and building association mortgages: *Walker v. Giles*, 6 C. B. (60 Engl. C. L. Rep.) 662; *Williams v. Haywood*, 22 Beav. 220, and to include mortgages given to them by strangers as well as by members: *Thorn v. Croft*, L. R. 3 Eq. 193, per Wood, V. C. See *Endl., B. A.*, §§ 458-459.

pose of winding up.¹¹⁷ Neither, for similar reasons, are the assets to answer the demands of withdrawing members.¹¹⁸

§ 8784. **Voluntary Repayment by the Borrower.**—It is obvious that the contract of loan, as well as the usual terms of the security given for its faithful observance, is inconsistent with, and implicitly negatives, the right of withdrawal.¹¹⁹ The rules of some societies expressly declare that borrowers shall not have that right, except upon condition of previous repayment.¹²⁰ Yet the same reasons which make withdrawal a valuable right to the investing, require a similar provision in favor of the borrowing member. Hence there is accorded to him, at all times, the right of voluntary repayment. The terms upon which this right is to be exercised may be regulated by statute, which cannot, of course, be departed from to the prejudice of the borrower,¹²¹ or by charter or by-law provisions. As in the cases of withdrawals, the requirements of such provisions must be strictly observed by the borrower desirous of availing himself of their privileges,¹²² though, in the construction of the provisions,

¹¹⁷ *Lister v. Log Cabin B. Asso.*, 38 Md. 115; *Endl., B. A.*, § 457. The amount for the time being secured to a building association by mortgages from its members, within the meaning of the English Build. Soc. Act of 1874, § 15, subs. 2, is not limited to the amount of principal secured, but covers all loans due on the members' securities at the time of the loans to the society, whether for principal or interest, and all installments not then accrued due, but secured by the mortgage and outstanding: *Neath B. Soc. v. Luce*, L. R. 43 Ch. D. 158; and in ascertaining the amounts advanced out of an *ultra vires* loan by the society on security, the whole amount secured is to be taken, although a commission was charged for the advance and deducted from it: *ibid.*

¹¹⁸ *State v. Redwood Falls B. & L. Asso.*, *supra*.

¹¹⁹ See *Endl., B. A.* §§ 128–133, 447.

¹²⁰ See *Anderson B. & C. Asso. v. Thompson*, 88 Ind. 405. See *Southern B. & L. Asso. v. Harris*, 98 Ky. 41; 32 S. W. Rep. 261; *ante*, § 8767, note.

¹²¹ As by providing for a rebate upon the amount payable of a certain proportion of the premium bid for every unexpired year (within a cer-

tain number) of the society's, or series', running, only whole years can be counted, and no allowance claimed for additional fractions of years: *Build. Asso. v. Rock*, 9 Phila. (Pa.) 75. Compare *Fitzgerald v. Hennepin Co. & C. Asso.*, (Minn.) 57 N. W. Rep. 1066: Such provisions are said not to apply to cases of foreclosure on default, but only to voluntary repayments: *Mut. B. & L. Asso. v. Tascott*, 143 Ill. 305; *People's B. & L. Asso. v. Billing*, 104 Mich. 186; 62 N. W. Rep. 373. See on this subject here referred to, *Endl., B. A.*, §§ 405–406.

¹²² *Shannon v. Howard Mut. B. Asso.*, 36 Md. 383. But a building association which demands, as a condition of repayment or withdrawal, a sum greater than what is due and persists in such demand after its attention has been directed to the error, is in no position to urge that the borrower has lost his right to repay or withdraw by his non-action for several years thereafter, where he offered to pay the amount legally due the association at the time of his proposed repayment or withdrawal, and has ever since been ready and willing to settle on that basis: *People's B. & L.*

the right of repayment is to be favored.¹²³ So construed, their term, as concerns the right itself and the benefits or rebate to be allowed the repaying borrower, are binding upon both parties,¹²⁴ subject only to such modifications as, remembering that the contract of loan or mortgage and the contract of membership are inseparably interwoven, and, therefore, to be construed together, are introduced by subsequent alterations in the by-laws which legitimately affect the latter, and are not inconsistent with either.¹²⁵ In the absence of any such statutory, charter or by-law provision on the subject of repayment, where the repaying borrower desires to obtain a discharge not only from his debt, but also from his membership, the same proportion of bonus or benefit, the same share of the common profits as is conceded to withdrawing members¹²⁶ is to be accorded to him.¹²⁷ Apart, however, from any such provision the general rule, adopted in England and recognized in America, obtains, that a borrower may redeem his property mortgaged and discharge his indebtedness by payment of all the future subscriptions which would accrue under his contract until the dissolution of the society, or the expiration of the series, its probable duration to be ascertained by calculation and the future payments to be treated as immediately due, his stock being abandoned to the association.¹²⁸

Asso. v. Furey, 47 N. J. Eq. 410; 20 Atl. Rep. 380.

¹²³ *Endl., B. A., §§ 137-138; Oak Cottage B. Asso. v. Eastman*, 31 Md. 556; *Barker v. Bigelow*, 15 Gray (Mass.) 130.

¹²⁴ See *Endl., B. A., §§ 134-144; Mosley v. Baker*, 6 Hare, 87; 1 Hall & Ter. 301; 27 Engl. L. & Eq. Rep. 512; *Seagrave v. Pope*, 1 De G., M. & G. 783; 15 Engl. L. & Eq. Rep. 477; *Fleming v. Self*, 3 De G., M. & G. 997; *Archer v. Harrison*, 7 id. 404; *Smith v. Pilkington*, 1 De G., F. & J. 120; *Farmer v. Smith*, 4 H. & N. 196; *Sparrow v. Farmer*, 26 Beav. 511 (where the right to repay was held to be still subsisting, though the period fixed for the termination of the society had expired); *Oak Cottage B. Asso. v. Eastman*, 31 Md. 556, and cases *infra*, *passim*.

¹²⁵ See *Endl., B. A., §§ 141-142; supra*, §§ 8721, 8732, 8770; *Rosenburg v. Northumberland B. Soc.*, 22 Q. B. D. 373; *Wilson v. Miles Plating B. Soc.*, id. 381; *Bradbury v. Wild* [1893], Ch. 377. In these cases it was held that

borrowers could be affected by subsequent rules requiring contribution to losses before obtaining releases of their mortgages,—a liability which was not imposed upon them by the rules as they stood when the loans were taken. See, however, *In re Norwich &c. B. Soc.*, L. R. 1 Ch. D. 481; *Archer v. Harrison*, *supra*; *Auld v. Glasgow &c. B. Soc.*, L. R. 12 App. Cas. 197; *Buckle v. Lordoung*, 56 L. J. Ch. 437; *Brownlie v. Russell*, 8 App. Cas. 235; *Post v. North Brit. &c. Soc.*, 11 id. 487; *McKenney v. Diamond State L. Asso.*, 8 Houst. (Del.) 557; 18 Atl. Rep. 905. And compare *Lime City B., S. & L. Asso. v. Wagner*, 122 Ind. 78.

¹²⁶ See *supra*, § 8730.

¹²⁷ *Fleming v. Self*, *supra*; *People's B. & L. Asso. v. Furey*, 47 N. J. Eq. 410; 20 Atl. Rep. 890; *Internat. B. & L. Asso. v. Biering*, (Tex.) 26 S. W. Rep. 39; *Turner Ban Verein v. Woodburn*, 27 Ohio L. J. 409. This extends to the reduction of redemption moneys: *Smith v. Pilkington*, *supra*.

¹²⁸ *Mosley v. Baker*, 6 Hare, 87; 1

This rule recognizes two important principles: (1) that, in striking the account between the borrowing member and the association, at any time after the creation of the indebtedness and prior to its working off in the natural course of the scheme, he is, if he so chooses, to be credited with all his periodical payments on account of stock and interest; and (2) that he is to be credited, in the absence of any allowance by statute or by-law on account of profit or other benefits, only with his actual payments.¹²⁹ Where, however, a

Hall & Tw. 301; 3 De G., M. & G. 1032; Fleming v. Self, ib. 997; Smith v. Pilkington, 1 De G., F. & J. 120; Farmer v. Smith, 4 H. & N. 196; Sparrow v. Farmer, 26 Beav. 511; Handley v. Farmer, 29 id. 362; Seagrave v. Pope, 1 De G., M. & G. 783; 15 Engl. L. & Eq. Rep. 477; Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428; Somerset Co. B., L. & S. Asso. v. Vandervere, 11 id. 282; Mechanics' B. & L. Asso. v. Conover, 14 id. 219 (not disturbed, in this particular, in 17 id. 497); City B. & L. Asso. v. Fatty, 1 Abb. App. Dec. (N. Y.) 347; Cit. Mut. L. & A. F. Asso. v. Webster, 25 Barb. (N. Y.) 264; Robertson v. Amer. Homest. Asso., 10 Md. 397; Shannon v. Howard Mut. B. Asso., 36 id. 383; Lister v. Log Cabin B. Asso., 38 id. 115; McCahan v. Columbian B. A., 40 id. 226; Henninghausen & Wolff v. Fischer, 50 id. 583; Border State Perp. B. Asso. v. McCarthy, 57 id. 535; Home Mut. B. Asso. v. Thursby, 58 id. 284; Hagerman v. Ohio B. & S. Asso., 25 Ohio St. 186; Risk v. Delphos B. & L. Asso., 31 id. 517; Cincinnati Germ. B. Asso. v. Flach, 1 Rep. (Cinc. Super. Ct.) 468; Winchester B. Asso. v. Gilbert, 23 Gratt. (Va.) 787; Fox v. Cottage & C. Asso., 81 Va. 677. See also Tilley v. Amer. B. & L. Asso., 52 Fed. Rep. 618; Roberts v. Amer. B. & L. Asso., 52 Ark. 572, and Mandlin v. Amer. S. & L. Asso., 63 Minn. 358 (*infra*, § 8786, note), and Richards v. Bibb Co. L. Asso., 24 Ga. 198; Ocmulgee B. & L. Asso. v. Thomson, 52 id. 427; Georgia State B. & L. Asso. v. Amer. Inv. & L. Co., (Ga.) 29 S. E. Rep. 299; Overby v. Fayetteville B. & L. Asso., 81 N. C. 56; Hoskins v. Mechan. B. & L. Asso., 84 id. 838; Hekelnkaemper v. Germ. B. & S. Asso., 22 Kan. 549; Glynn v. Home B. Asso., ib. 746; Watkins v.

Workingmen's B. & L. Asso., 97 Pa. St. 514; Ricks v. Durant B. & L. Asso., (Miss.) 18 So. Rep. 359 (citing Asso. v. McElroy, 72 Miss. 411; 17 So. Rep. 348, holding that the borrower is to be charged, for purposes of voluntary repayment, with the price of the stock held by him, the monthly dues for each share so held, the monthly interest at the agreed rate, and in case of default, the agreed fines, and to be credited with the amounts paid by him),—and the succeeding sections of the text.

¹²⁹ Endl., B. A., § 132. The fact that the security is given for a definite sum, rather than for mere payment of dues, etc., is of no practical moment, as affecting the application of the rule stated, though it may make its application less difficult and more certain: ib., § 133. Where the charter and by-laws required the mortgagor to pay 6 per cent. interest in monthly installments, and sixty cents per share monthly dues,—fifty cents into the loan fund and ten to defray expenses,—with an option to repay his loan on thirty days' notice, it was held, that, on exercising his option, he was to be charged with the loan and interest, and credited with his payments into the loan fund, and interest on each payment from the value of it,—but not with any dividends, the by-laws denying the right to such borrowers: Middle States L., B. & Const. Co. v. Hagerstown Mattress & C. Co., 82 Md. 406; 33 Atl. Rep. 886. In Merchantville B. & L. Asso. v. Zane, (N. J.) 38 Atl. Rep. 420, the holder of twenty-five shares gave a mortgage to a building association, pledging his stock as collateral; subsequently he gave a second mortgage to another party on the same property; thereafter he was allowed to with-

borrower succeeds in rescinding his contract with an association on the ground of fraudulent inducements employed to draw him into it, on the part of those whose acts are imputable to the society, he is chargeable only for what he has actually received and legal interest thereon.¹³⁰ And so, too, where the society, by a change of its by-laws, has rendered itself powerless to fulfill its part of the contract.¹³¹

§ 8785. **Default: Death.**—It follows from principles above stated, that, where a borrower makes default, and thereby puts himself outside of the provisions of statute or by-law giving a benefit to one voluntarily repaying,¹³² the only credit he can claim upon his debt, by reason of his past payments, is the amount of dues and interest actually paid in by him.¹³³ But the society cannot equitably claim to recover on the borrower's obligation without giving him any credit thereon for his stock, at the same time forfeiting it to the society.¹³⁴ Where the obligation provides that, upon a de-

draw his stock and substitute twenty-five shares of a later series, of little value at the time, as collateral for his loan from the society, and received the withdrawal value of the first twenty-five shares: it was held that this was not a payment of his debt to the society, so as to postpone its first mortgage on his property to that of the second mortgagee.

¹³⁰ *Neuman v. N. Y. Mut. S. & L. Asso.*, 44 N. Y. Supp 896. On a suit by a member for account and to redeem, the decree should name a reasonable term for payment and order sale on default. *Ricks v. Durant B. & L. Asso.*, (Miss.) 18 So. Rep. 359; and when the bill shows a desire to terminate connection with the society, it will afford full relief by ascertaining what is due on the stock and end the whole controversy: *Middle States & Co. v. Hagerstown & Co.*, *supra*.

¹³¹ *Internat. B. & L. Asso. v. Braden*, (Tex.) 32 S. W. Rep. 704.

¹³² *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 514; *Matterson v. Elderfield*, L. R. 4 Ch. 207, and see *Mechanics' B. & L. Asso. v. Conover*, 14 N. J. Eq. 219.

¹³³ *Watkins v. Workingmen's B. & L. Asso.*, *supra*; *Barker v. Bigelow*, 15 Gray (Mass.) 130; *Endl.*, B. A., §§ 149, 480-482. See also *Mechan. B. &*

L. Asso. v. Conover, *supra*; *Link v. Germantown B. Asso.*, 89 Pa. St. 15; *McGrath v. Hamilton B. Asso.*, 14 id. 383; *Hensel v. Internat. B. & L. Asso.*, (Tex.) 20 S. W. Rep. 116. It must be remembered, however, that the amount of the advance is not the measure of the borrower's liability, but the aggregate of what he would have paid had he performed his contract: *Georgia State B. & L. Asso. v. Amer. Inv. & L. Co.*, (Ga.) 29 S. E. Rep. 299. To get at this, the rule laid down in *Roberts v. Amer. B. & L. Asso.*, 52 Ark. 572; 36 S. W. Rep. 1085, is to ascertain the amount of dues and interest up to the time of maturity, as estimated; the principal, which, with interest for the supposed time, will amount to the dues and interest so calculated, equals the present value of the anticipated payment, and that, together with arrearages and fines, is the amount collectible by the association. To the same effect, substantially, is *Mandlin v. Amer. S. & L. Asso.*, 63 Minn. 358; 65 N. W. Rep. 645. See *Murphy v. Goodland B. & L. Asso.*, 2 Kan. App. 330; 43 Pac. Rep. 863, for method of computation on default under Kansas statutes.

¹³⁴ See *ante*, § 8720. Where a defendant owned originally sixteen shares, then bought twenty-four more from

fault in stipulated payments for a certain length of time, the whole amount shall at once become due, it is optional with the society to act promptly upon such default,¹³⁵ or to delay action, and in the latter event, when it does proceed, it will be entitled to an accounting up to the time when it elects to foreclose.¹³⁶ On the death of a borrower and sale of his property, discharging the society's mortgage, the same allowance is to be made as in case of voluntary repayment.¹³⁷

§ 8786. **Special Arrangements.**— In the same manner, whilst it is lawful for a building association to compromise with its borrowers,¹³⁸ and hence to sanction a method and terms outside of those provided by statute or by-law for the extinction of their indebtedness,¹³⁹ such an arrangement can be taken advantage of only by those who avail themselves of the privilege in the manner and within the time specified by the resolution permitting it.¹⁴⁰

§ 8787. **Effect of Repayment, etc., on Membership: Application of Stock.**— Any settlement of a loan in which credit is given the borrower for his stock interest, terminates his membership. Such an application, however, does not follow as a matter of course.¹⁴¹

other holders, paying them the calls thereon up to the date of purchase. (which shares were transferred to her on the books,) and thereupon got a loan, she was entitled to credit upon it in respect of these twenty-four shares as if they had been originally owned by her: *Mutual S. & L. Asso. v. Owings*, (Ky.) 43 S. W. Rep. 422.

¹³⁵ Giving time may, according to *Smith v. Old Dominion B. & L. Asso.*, 119 N. C. 257; 26 S. E. Rep. 40, release a wife who has mortgaged her property for her husband's debt to the society.

¹³⁶ *U. S. S. & L. Co. v. Cade*, 15 Wash. 38; 45 Pac. Rep. 656. But see *U. S. S. & L. Co. v. Sullivan*, 80 Fed. Rep. 762, that the accounting is to be as of the time when the right accrued.

¹³⁷ *Snider's Est.*, 34 Leg. Int. (Pa.) 49; i. e., the withdrawal value, not the estimated value, is to be allowed: *Hensel v. Internat. B. & L. Asso.*, *supra*.

¹³⁸ *Supra*, § 8760.

¹³⁹ *Booz's App.*, 109 Pa. St. 592.

¹⁴⁰ *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 514; *Booz's App.*, *supra*, (where it was also held, that, such a resolution having been adopted, another may be validly and bindingly adopted limiting the privilege to a certain time, beyond which borrowers shall not be at liberty to claim its privileges). Such arrangements, in general, apply only to persons voluntarily repaying: *Johnston v. Eliz. B. & L. Asso.*, 104 Pa. St. 394. Compare, however, *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428, where the arrangement was designed to be a final one, and hence, equitably, applicable to all borrowers: also *Goggin v. Kelly*, (Tex.) 25 S. W. Rep. 1133, where it was held that a society, after insolvency, could not refuse to settle upon the terms offered previously to other borrowers. Compare *infra*, § 8796.

¹⁴¹ Compare *Eversmann v. Schmitt*, 53 Ohio St. 174; 41 N. E. Rep. 139; *ante* § 8735, note.

Stock payments are not *ipso facto* payments upon the indebtedness.¹⁴² But they may be so applied by the member,¹⁴³ his representative¹⁴⁴ or his surety,¹⁴⁵ unless he has lost his control over them by assigning¹⁴⁶ them, subject to the association's claims, to a third

142 Endl., B. A., §§ 477-484; North Amer. B. Asso. v. Sutton, 35 Pa. St. 63; Spring Garden Asso. v. Tradesmen's L. Asso., 46 id. 493; Link v. Germantown B. Asso., 89 id. 15; Watkins v. Workingmen's B. & L. Asso., 97 id. 514; Kreamer v. Build. Asso., 6 W. N. (Pa.) 267; Build. Asso. v. Eshelbach, 7 id. 189; Build. Asso. v. Wall, ib. 240; Kingessing B. Asso. v. Roan, 9 id. 15; Springville B. Asso. v. Raber, 33 Leg. Int. (Pa.) 329; Selden v. Reliable S. & B. Asso., 32 Sm. (Pa.) 336; Economy B. Asso. v. Hungerbuehler, 93 Pa. St. 258; Germania B. Asso. v. Neill, ib. 322; Early & Lane's App., 89 id. 411; Weiss's App., 5 W. N. (Pa.) 423; Mechanics' B. & L. Asso. v. Conover, 14 N. J. Eq. 219 (not disturbed in this particular by 17 id. 497); People's B. & L. Asso. v. Furey, 47 N. J. Eq. 410; 20 Atl. Rep. 890; Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428; Somerset Co. B., L. & S. Asso. v. Vandervere, 11 id. 282; State v. Hornbacker, 42 N. J. L. 635; Hekelukaemper v. German & Co. Asso., 22 Kan. 549; Seibel v. Vict. B. Asso., 43 Ohio St. 371; Tilley v. Amer. B. & L. Asso., 52 Fed. Rep. 618; Reeve v. Ladies' & Co. Asso., 56 Ark. 335; 19 S. W. Rep. 917; Barker v. Bigelow, 15 Gray (Mass.) 130, 137; Delano v. Wild, 6 Allen (Mass.) 1; Rowland v. Old Dominion B. & L. Asso., 118 N. C. 173; 24 S. E. Rep. 366; Equitable B. & L. Asso. v. Vance, 49 S. C. 402; 27 S. E. Rep. 274; 29 id. 204; Pioneer S. & L. Co. v. Cannon, 96 Tenn. 599; 36 S. W. Rep. 386; Post v. Mechanics' B. & L. Asso., 97 Tenn. 408; 37 S. W. Rep. 216; Sweeney v. El. Paso B. & L. Asso., (Tex.) 26 S. W. Rep. 290; Blakeley v. *Same*, id. 282; Build'g Asso. v. Logan, (Tex.) 33 id. 1088; Pioneer S. & L. Co. v. Everheart, (Tex.) 44 id. 885; Price v. Kendall, (Tex.) 36 id. 810; Rogers v. Raines, (Ky.) 38 id. 483. See, *contra*, Kupfert v. Guttenberg B. Asso., 30 Pa. St. 465; Hughes' App., ib. 471; Philanthropic B. Asso. v. McKnight, 35 id.

470; Build'g Asso. v. Timmins, 3 Phila. (Pa.) 209; Build'g Asso. v. Reid, ib. 345; Savings Fund v. Murray, 14 Leg. Int. (Pa.) 133; Columbia B. Asso. v. Dobbins, 15 id. 45; Build'g Asso. v. Rowe, ib.; Overby v. Fayetteville B. & L. Asso., 81 N. C. 56; Hoskins v. Mechan. B. & L. Asso., 84 id. 838. And see Fox v. Cottage B. F. Asso., 81 Va. 677. In York Trust & Co. v. Gallatin, 186 Pa. St. 150, it is held that the appropriation of stock payments in liquidation of the debt may be made by the terms of the contract between the society and the borrower, i. e., at the inception of their relations as lender and borrower, once for all, and that, if so made, every stock payment goes, *pro tanto*, in reduction of the debt, without regard to losses, etc., of the society, and that all the borrowers can ever be, even upon insolvency of the association, held for is the difference between the aggregate of his payments and the face of his obligation — which seems to be an implied recognition of the legality of "definite payment" contracts.

143 Spring Garden Asso. v. Tradesmen's B. Asso., 46 Pa. St. 493; Early & Lane's App., 89 id. 411; North American B. Asso. v. Sutton, 35 id. 463; Watkins v. Workingmen's B. Asso., 97 id. 524; Economy B. Asso. v. Hungerbuehler, 93 id. 218; Wadlinger v. Washington & Co. Asso., 153 id. 622. Compare Pioneer S. & L. Co. v. Cannon, 96 Tenn. 599, 36 S. W. Rep. 386; *Same* v. Everheart, (Tex.) 44 id. 885, where it is said that this right does not exist without an agreement giving it.

144 E. g., assignee for benefit of creditors: Spring Garden Asso. v. Tradesmen's B. A., *supra*.

145 Massey v. Cit. B. & Co. Asso., 22 Kan. 624; if the surety pays the debt, he is entitled to subrogation to the society's rights upon the borrower's stock, as against an attaching creditor; Diener v. Egolf, 1 Chest. Co. Rep. (Pa.) 55.

146 See *supra*, § 8736, note.

party.¹⁴⁷ It may also be so applied by the association itself, holding the stock under an assignment as collateral security.¹⁴⁸ And its right to make such application of it cannot be defeated by the borrower as, e. g., by making a second assignment of it to another.¹⁴⁹ But the duty to make it may be enforced upon the association by a junior mortgagee of the property on which the association holds its mortgage.¹⁵⁰ But, there being no application by the borrower and no such equities in the way, the association may, if the borrower's obligation is such as to warrant it, proceed upon the same and collect the whole loan without giving credit or making any deduction for stock payments theretofore made by him.¹⁵¹ In such case, however, if the society realizes its claim, the borrower's membership is preserved,¹⁵² and he is entitled to a return of the stock

¹⁴⁷ Schober v. Accommodation S., F. & L. Asso., 35 Pa. St. 223; Philadelphia Merc. L. Asso. v. Moore, 47 id. 223; Wadlinger v. Washington & C. Asso., *supra*.

¹⁴⁸ Spring Garden Asso. v. Tradesmen's B. Asso., *supra*; North America B. Asso. v. Sutton, 35 Pa. St. 463; Economy B. Asso. v. Hungerbuehler, 93 id. 258; and see Vanneman & Swedesboro Loan & C. Asso., 42 N. J. Eq. 263; 7 Atl. Rep. 676. An assignment, absolute on its face, to a building association may be shown to have been only as collateral security: Ginz v. Stumph, 73 Ind. 209.

¹⁴⁹ Wadlinger v. Washington & C. Asso., *supra*.

¹⁵⁰ Herbert v. Mechan. B. & L. Asso., 17 N. J. Eq. 497; Redbank Asso. v. Patterson, 27 id. 223; Washington B. & L. Asso. v. Beaghen, ib. 99; Philippsburg Mut. L. & B. Asso. v. Hawk, ib. 355; Reilly v. Mayer, 12 id. 55; and see Winchester B. Asso. v. Gilbert, 23 Gratt. (Va.) 787. In Pennsylvania this doctrine is denied: Spring Garden Asso. v. Tradesmen's B. Asso., 46 Pa. St. 493; Link v. Germantown B. Asso., 89 id. 15; Economy B. Asso. v. Hungerbuehler, 93 id. 258; Hemperly v. Tyson, 170 id. 385; Springville B. Asso. v. Raber, 33 Leg. Int. 329; Building Asso. v. Eshelbach, 7 Phila. 189; Selden v. Reliable L. & B. Asso., 32 Sm. 336; Kreamer v. Springfield B. Asso., 6 W. N. 267; Kingessing B. Asso. v. Roan, 9 id.

15; Asso. v. Wall, 7 Phila. 189. The rights of the junior creditor, however, are protected by the doctrine of subrogation, whereby, though the association will not be prevented from proceeding upon the mortgage or compelled to exhaust the stock before doing so, the creditor will be substituted in its rights upon the same: Endl. B. A., §§ 460-466. A subsequent judgment creditor does not seem to have the same standing as a junior mortgagee: Herbert v. Mechanics' B. & L. Asso., *supra*. An attaching creditor takes nothing in the stock attached until after the society's rights are exhausted: Early & Lane's App., 89 Pa. St. 411; Hemperly v. Tyson, 170 id. 385; Weiss' App., 5 W. N. (Pa.) 423; Compare Economy B. Asso. v. Hungerbuehler, 93 Pa. St. 258; Central B. A. v. Schmitt, 12 W. N. (Pa.) 239. If there are any equities to compel the prior lien creditor to satisfy himself from any particular fund, the junior creditor must notify him thereof: Uniontown B. & L. Asso's App., 92 Pa. St. 200. See Washington B. & L. Asso. v. Beaghen, *supra*.

¹⁵¹ People's B. & L. Asso. v. Furey, (N. J.) 20 Atl. Rep. 890. And see North Am. B. Asso. v. Lutron, 35 Pa. St. 463; Economy B. Asso. v. Hungerbuehler, 93 id. 258.

¹⁵² North Am. B. Asso. v. Lutron, *supra*; People's B. & L. Asso. v. Furey, *supra*. See also Henninghausen & Wolff v. Fischer, 50 Md. 583.

pledged as collateral security for the loan.¹⁵³ A sale upon a mortgage, of course, divests the land covered by it of its lien.¹⁵⁴ But it does not necessarily discharge the debt,¹⁵⁵ nor as has been seen,¹⁵⁶ does voluntary repayment, whilst it extinguishes the debt, extinguish also the mortgage in so far as it secures the performance of membership duties, unless accompanied with an abandonment of the stock and consequent cessation of the membership relation.¹⁵⁷

¹⁵³ Rowland v. Old Dominion B. & L. Asso., 116 N. C. 877; 118 id. 173; 22 S. E. Rep. 8.

¹⁵⁴ Germania B. Asso. v. Neill, 93 Pa. St. 322.

¹⁵⁵ E. g., where the proceeds are insufficient to liquidate the whole amount due the association: See Middleditch v. Ellis, 2 Exch. 365; 8 Scott, N. R. 406; 2 D. & L. 299; Matthew v. Backmore, 1 H. & N. 761, that, where there is a covenant for repayment, assumpsit will not lie to recover a deficiency: See also Price v. Moulton, 10 C. B. (70 Engl. C. L.

Rep.) 561, but compare Sheriff v. Glenton, 28 L. T. (N. S.) 65. That, however, a deficiency may be recovered by action, see Yates v. Aston, 4 Q. B. 182; 3 G. & D. 351; McCahan v. Columbian B. Asso., 40 Md. 237; Germania B. Asso. v. Neill, 93 Pa. St. 322. It is said in Fox v. Cottage B. F. Asso., 81 Va. 677, that a sale on default should be for such amount of cash as is necessary to pay expenses and sums due.

¹⁵⁶ *Supra*, § 8718.

¹⁵⁷ Endl., B. A., §§ 67-68, 449.

CHAPTER CCXLIII.

DISSOLUTION AND WINDING UP.

SECTION	SECTION
8790. Modes in which these associations may become dissolved.	8794. Member's petition for winding up.
8791. Voluntary surrender of charter: insolvency: abandonment: withdrawal.	8795. Effect of dissolution as to society and members.
8792. Dissolution by decree of court: receivership.	8796. Effect of dissolution or abandonment as to borrowers: suspensions.
8793. Distribution of assets on insolvency.	8797. Foreign building associations. contracts: receivers.

§ 8790. **Modes in which These Associations May Become Dissolved.**—The corporate existence of a building association is in strictness terminated only in one of four ways, viz.: (1) by the expiration of the franchise under original charter limitation upon its continuance;¹ (2) by the action of the legislature;² (3) by a valid, or executed, agreement of its members, or voluntary surrender of the corporate franchise; and (4) by the decree or interference of court.³ It is only the last two methods that require special notice.

§ 8791. **Voluntary Surrender of Charter: Insolvency: Abandonment: Withdrawals.**—In order to constitute a voluntary surrender by agreement of the corporators, such agreement must be unanimous.⁴ It follows that one portion of the membership cannot,

¹ When the shares have reached par, the association ceases, *ipso facto*, except for the purpose of winding up its affairs; Hagerman v. Ohio B. & S. Asso., 25 Ohio St. 183; Laurel Run B. Asso. v. Sperring, 106 Pa. St. 334. It cannot defer closing for a further advance in its property, in the meanwhile requiring members to continue stock payments: Burns v. Metrop. B. Asso., 2 Mackey (D. C.) 7. The limitation will be supplied from the general law under which the charter was

granted and treated as embodied in the latter: Miller's Est., 2 Pears. (Pa.) 248.

² Endl., B. A., § 503. See Cooper v. Oriental S. & L. Asso., 100 Pa. St. 405, 407.

³ Endl., B. A., §§ 496-498.

⁴ Ibid., §§ 499-500; Pfaff v. Build. Asso., 6 W. N. (Pa.) 349; Barton v. Enterprise L. & B. Asso., 114 Ind. 226; 16 N. E. Rep. 486; Bergman v. St. Paul Mut. B. Asso., 29 Minn. 275; 13 N. W. Rep. 120; and see People v.

though in the majority, force dissolution upon the dissenting minority by compulsory withdrawals.⁵ Nor can the directors do so, by making an assignment for benefit of creditors, where the society is not insolvent, without the assent of the stockholders.⁶ Unanimous consent to dissolution may, indeed, be inferred where all the assets of the corporation are transferred to one person,⁷ or, it seems, where the society has assigned all its unpaid loans, paid off all its stockholders and ceased to transact any business.⁸ The mere insolvency of the society, however,⁹ or the omission to elect officers¹⁰ does not amount to a dissolution. But a transfer, in consequence of hopeless insolvency, of the society's property to a receiver,¹¹ or assignee for benefit of creditors,¹² as well as an abandonment by mutual consent of the original purposes of the incorporation¹³ and the withdrawal of an integral portion of the membership taking their money with them and crippling the association so as to make its future success-

Lowe, 47 Hun (N. Y.) 577 (not, it seems, disturbed in this particular by 117 N. Y. 175; 22 N. E. Rep. 1016); (Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428, is not an authority *contra*, the circumstances having been peculiar and the ruling of the court dictated by them.) See Sibun v. Pearce, 44 Ch. Div. 354, that withdrawing members are to be counted. Where the stockholders had agreed in writing to dissolve, the agreement was held valid, and binding on the assignee of one of them: White Haven L. & B. Asso. v. Kelly, 9 Luz. Leg. Reg. (Pa.) 9; and a stockholder cannot claim benefits under a resolution to dissolve, and at the same time repudiate the duties imposed thereby: Centr. B. Asso. v. Witzell, 13 Phila. (Pa.) 54.

⁵ Pfaff v. Build. Asso., *supra*; Wm. Brown B. Asso. Est., 12 W. N. (Pa.) 207; Reg. v. D'Eyncourt, 4 Best & Sm. (116 Engl. C. L. Rep.) 820. In Bergman v. St. Paul & C. Asso., 29 Minn. 275, it was held that the society cannot deprive an unconsenting member of the right secured to him by corporate articles, e. g., by retiring and canceling shares of stock against the wish of the holder, though a by-law in force before he became such authorized the directors to set aside certain moneys for the cancellation of certain shares and a subsequent amendment authorizing compulsory

cancellation was submitted to by other stockholders and he shared in the accruing benefits.

⁶ Powers v. Blue Grass B. & L. Asso., 86 Fed. Rep. 705.

⁷ See Cook v. Kent, 105 Mass. 246. Also: City L. & B. Asso. v. Goodrich, 48 Ga. 445; Goodrich v. City L. & B. Asso., 54 id. 98; Thomson v. Ocmulgee B. & L. Asso., 56 id. 350.

⁸ Van Pelt v. Home B. & L. Asso., 87 Ga. 370; 13 S. E. Rep. 574; s. c. 98 Ga. 615; 21 S. E. Rep. 606.

⁹ Formerly v. Port Richmond B. & L. Asso., 3 W. N. (Pa.) 11; Endl., B. A., §§ 498, 511.

¹⁰ Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428. See also Watkins v. Workingmen's B. & L. Asso., 97 Pa. St. 514; Hekelukaemper v. Germ. B. Asso., 22 Kan. 549; Thomson v. Ocmulgee B. & L. Asso., 56 Ga. 350.

¹¹ St. Peter's B. Asso. v. Jaecksch, 51 Md. 198; Hampstead B. Asso. v. King, 58 Md. 279; Strahen v. Franklin S. F. & L. Asso., 115 Pa. St. 273; 8 Atl. Rep. 843; Rogers v. Hargo, 92 Tenn. 35; 20 S. W. Rep. 430; Binst v. Bryan, 44 S. C. 121; 21 S. E. Rep. 537.

¹² Criswell's App., 100 Pa. St. 488; Christian's App., 102 id. 184.

¹³ Goodrich v. City L. & B. Asso., 54 Ga. 98; Sumter B. & L. Asso. v. Winn, 45 S. C. 381; 23 S. E. Rep. 29.

ful operation impossible¹⁴—are each, because putting an end to the business of the society as a building association, treated as a practical and virtual dissolution of it.¹⁵

§ 8792. **Dissolution by Decree of Court: Receivership.**—The power of the court to decree a dissolution can be exercised only at the instance of the State,¹⁶ upon grounds recognized as cause of forfeiture,¹⁷ or at the instance of shareholders under some statutory authority or circumstances giving them a standing.¹⁸ But an administration of the affairs and property of a building association, through the instrumentality of a receiver, may be assumed by the courts upon the petition of parties in interest and upon a sufficient showing of facts.¹⁹ The grounds for this interference may be various. The mere fact that the society is without responsible officers does not seem to be one.²⁰ Violation of the provisions of the society's act of incorporation, or misuse of the franchise in matters concerning the essence of the contract between it and the

¹⁴ Windsor & Applegarth v. Bandel, 40 Md. 172.

¹⁵ Endl., B. A., § 522. As to mere suspensions, however, or refusal of members to pay dues, see id., §§ 532–534, and *infra*, § 8796.

¹⁶ Endl., B. A., § 507; Glover v. Giles, L. R. 18 Ch. 173.

¹⁷ Id., §§ 505–506; e. g., abuse or perversion of corporate franchise: See Manuf. & Mech. S. & L. Co. v. Conover, 5 Phila. (Pa.) 18; State v. Greenville B. Asso., 29 Ohio St. 92; Miller's Est., 2 Pears. (Pa.) 248; Rhoads v. Hoernerstown B. Asso., 82 Pa. St. 180; Becket v. Uniontown B. Asso., 88 id. 211; State v. Amer. S. & L. Asso., 64 Minn. 349; 67 N. W. Rep. 1; and comp. State v. Oberlin B. & L. Asso., 35 Ohio St. 258; People v. Troy House Co., 44 Barb. (N. Y.) 625 (but the State will not interfere simply to redress private wrongs: People v. Lowe, 117 N. Y. 175; 22 N. E. Rep. 1016);—any omission or irregularity in the proceedings for incorporation: See Becket v. Uniontown B. Asso., *supra*; Workingmen's B. Asso. v. Coleman, 89 Pa. St. 428; Martin v. Nashville B. Asso., 2 Cold. (Tenn.) 418; Gordon v. Winchester B. & A. F. Asso., 12 Bush (Ky.) 110;—or fraud in obtaining the same: See Pattison v. Albany B. & L. Asso., 63 Ga. 373;

Lincoln B. & S. Asso. v. Graham, 7 Neb. 173; *Same* v. Benjamin, ib. 181;—or, under express statutory provision, impairment of its assets, unless upon notice they are made sufficient within a certain time. See Broadwell v. Inter. Ocean Homest. & L. Asso., 161 Ill. 327; 43 N. E. Rep. 1067; Continental Investm. & L. Soc. v. People, 167 Ill. 195; 47 N. E. Rep. 381 (note these cases as to sufficiency of wiping out deficit by charging it off *pro rata* against the stock held by members, and compare People v. Empire L. & Inv. Co., 44 N. Y. Supp. 308, holding that directors cannot do this when the deficit was created by expenditures in violation of the society's articles).

¹⁸ It was said in Sjöberg v. Security S. & L. Asso., (Minn.) 75 N. W. Rep. 1116, that equity has jurisdiction to wind up a building association on application of a minority of shareholders, where the purposes for which the society was organized have failed and it is shown that such action is reasonably necessary for the protection of the complainants' interests.

¹⁹ See Endl., B. & A. §§ 508–510.

²⁰ See Gormerly v. Port Richmond B. & L. Asso., 3 W. N. (Pa.) 11; Hoboken B. Asso. v. Martin, 13 N. J. Eq. 428.

State, so that it no longer fulfills the purposes for which it was created,²¹ and mismanagement, fraud and gross negligence of the officers, are.²² So is a conflict between the directors and the stockholders, the latter attempting to depose the former.²³ Insolvency,²⁴ owing to the complicated nature of the rights and liabilities of members and others interested in the distribution of a building association's assets, may be a ground for the appointment of a receiver.²⁵ But since the insolvency of a building association not empowered to contract debts can never arise from its inability to pay outside creditors, but can only consist in an inadequacy of its assets to the just demands of its stockholders,²⁶ it follows that the application for appointment of a receiver on the ground of such a society's insolvency must proceed from persons entitled to claim the status of, and interested and suing as, members.²⁷ On the other hand, where there is no disability to incur outside indebtedness, it has been held that there can be no "insolvency" of a building association which owes nothing except to its members as shareholders.²⁸

§ 8793. **Distribution of Assets on Insolvency.**—In the distribution of the assets of an insolvent building association, outside creditors²⁹ are, of course, first to be paid, before stockholders, claiming only as such, can be reached.³⁰ Nor is it doubtful that a mem-

²¹ State v. Amer. S. & L. Assn., 64 Minn. 349; 67 N. W. Rep. 1.

²² See *ibid.*; White v. Mechanics' B. Assn., 22 Gratt. (Va.) 233; Winchester B. Assn. v. Gilbert, 23 id. 787; Frostburg B. Assn. v. Stark, 47 Md. 338.

²³ Powers v. Blue Grass B. & L. Assn., 86 Fed. Rep. 705.

²⁴ Where the society is perfectly solvent, but requires time to realize on its assets to satisfy a withdrawing member, his claim that it is insolvent is not made out: In re Planet Ben. B. & Investm. Soc'y, L. R. 14 Eq. 441. Nor is such a claim established where the only subsisting debts are unenforceable because *ultra vires*: In re Profess'l &c. B. Soc'y, L. R. 6 Ch. 856.

²⁵ See In re Assigned Est. of The Nat'l S., L. & B. Assn., 9 W. N. (Pa.) 79, per Ludlow, P. J. But see Christian's App., 102 Pa. St. 184, 189, that the same result may be attained by an assignment for benefit of creditors.

²⁶ Towle v. Amer. B., L. & I. Soc., 61 Fed. Rep. 446; Endl., B. A., § 511.

²⁷ Endl., B. A., §§ 512-513; In re Queen's Ben. B. Soc'y, L. R. 6 Ch. 815; Gormley v. Port Richm. B. & L. Assn., 3 W. N. (Pa.) 11.

²⁸ Sjoberg v. Security S. & L. Assn., (Minn.) 75 N. W. Rep. 116, and in such a case, a receivership will be refused, when it does not appear that the method of liquidation pursued by the society is inequitable. *Ibid.* See also Steinberger v. Independ. L. & S. Assn., 84 Md. 625; 36 Atl. Rep. 439.

²⁹ Including depositors: Criswell's App., 100 Pa. St. 488.

³⁰ See Endl., B. A., §§ 485-487; Criswell's App., 100 Pa. St. 488; Christian's App., 102 id. 184; Kisterbock's App., 51 id. 483; Steinberger v. Independ. L. & S. Assn., 84 Md. 625; 36 Atl. Rep. 439; In re Mutual &c. Soc., 30 Ch. Div. 434. As to the status of depositors, see *ante*, § 8714.

ber may, at the same time, be a creditor.³¹ Next, as between shareholders claiming on account of stock which has been lawfully issued to them as preferred stock, they are entitled to payment before the holders of ordinary, or common stock.³² But where the incident of priority cannot be lawfully attached to prepaid or full-paid stock,³³ whether interest-bearing or not, the holders of such are not to be preferred in the order of payment, either as to the whole of the stock held by them or as to any excess paid by them as compared with holders of other stock, to the latter.³⁴ In proportion to the amount paid in by them, they, together with the holders of stock which has not been prepaid, will share alike³⁵ in the remainder of the assets.³⁶ It has been supposed that members who have given notice of withdrawal ought to be preferred over such as have not;³⁷ though it was conceded that a notice given after knowledge of the society's insolvency,³⁸ after a stoppage or a recognized necessity for a stoppage of its business,³⁹ or after the commencement of proceedings to wind it up,⁴⁰ could have no such effect. The correct view, however, based upon the broad ground of equality underlying the whole building association scheme, is that the order prescribed by the by-laws for the payment of money out of its treasury to the different classes of members, in the regular course of its business, has no application to the distribution of its assets when it becomes insolvent,⁴¹ and that, upon such distribution, all shareholders, in so far as their claims are based upon the ownership of stock (not issued upon an agreement of priority) must come in *pari passu*,

³¹ Criswell's App., *supra*. But where a director claims as a creditor on account of loans made by him to the society, which he helped unlawfully to apply to fraudulent payment of dividends, he will be postponed: Kisterbock's App., *supra*.

³² Murray v. Scott, 9 App. Cas. 519.

³³ See *ante*, § 8761.

³⁴ Hohenshell v. Home S. & L. Asso., 140 Mo. 566; 41 S. W. Rep. 948; Gibson v. Safety Homest. & L. Asso., 170 Ill. 44; 48 N. E. Rep. 580; Post v. Mechanics' B. & L. Asso., 97 Tenn. 408; 37 S. W. Rep. 216; Leahy v. Nat. B. & L. Asso., (Wis.) 76 N. W. Rep. 625; Towle v. Amer. B. & L. Asso., 75 Fed. Rep. 938.

³⁵ See cases in preceding note.

³⁶ Seibel v. Victoria B. Asso., 43 Ohio St. 371; People v. Lowe, 117 N.

Y. 175; 22 N. E. Rep. 1016; Knutson v. Northwest. L. & B. Asso., 67 Minn. 201; 69 N. W. Rep. 889.

³⁷ In re Norwich &c. B. Soc., 45 L. J. Ch. D. 785; Walton v. Edge, L. R. 10 App. Cas. 33; In re Blackburn & Distr. Ben. B. Soc., (C. A.) 48 L. T. (N. S.) 134; Barnard v. Tomson, [1894] 1 Ch. 374; Brownlie v. Russell, 8 id. 235. But compare, In re Alliance Soc., 49 L. T. Rep. (N. S.) 73.

³⁸ Kemp v. Wright, [1894] 2 Ch. 462; In re Sunderland &c. Soc., 24 Q. B. D. 394.

³⁹ In re Ambition Investm. B. Soc., [1896] 1 Ch. 89; *ante*, § 8733, note.

⁴⁰ Brownlie v. Russell, *supra*.

⁴¹ Criswell's App., *supra*; Rabbitt v. Wilcoxon, 103 Iowa, 35; 72 N. W. Rep. 306. A contract giving priority to stock, however, clearly has.

whether or not they be holders of matured stock,⁴² or of stock mistakenly declared to have matured,⁴³ and whether or not they have given notice of withdrawal and hold orders for payment to them of a designated withdrawal value⁴⁴—the basis of the computation being the amount paid in by each,⁴⁵ not the date of the issue of his stock, or its maturity, actual or supposed, or attempted withdrawal.⁴⁶

§ 8794. **Member's Petition for Winding Up.**—Members of a building association have also a recognized standing to ask for the winding up of the affairs of the association, or of the series to which they belong, whenever the time has, in point of fact, arrived when the shares are worth the stipulated par value fixed by the charter.⁴⁷ Upon such an application, it must be shown⁴⁸ that the assets of the association are sufficient to pay, over and above all losses and expenses, and after cancellation of the advanced members' securities, to every unadvanced member the par value of his shares, according to the original scheme.⁴⁹

§ 8795. **Effect of Dissolution as to Society and Members.**—The effect of dissolution, so far as the association is concerned, is to put an end to all corporate existence. It cannot institute a suit.⁵⁰ A

⁴² *Criswell's App., supra.*

⁴³ *Post v. Mechanics' B. & L. Asso.*, 97 Tenn. 408; 37 S. W. Rep. 216.

⁴⁴ *Christian's App., supra*; *Rabbitt v. Wilcoxon, supra*; *Gibson v. Safety Homest. & L. Asso., (Ill.)* 48 N. E. Rep. 580; *Heggie v. B. & L. Asso.*, 107 N. C. 581; 12 S. E. Rep. 275.

⁴⁵ See *Seibel v. Victoria B. Asso., supra.*

⁴⁶ *Endl., B. A.*, § 514, and *supra*, §§ 8732, 8734.

⁴⁷ *Endl., B. A.*, §§ 516-518; *Amer. v. Union B. & L. Asso., (N. J.)* 24 Atl. Rep. 552; *O'Rourke v. West Penna. L. & B. Asso.*, 93 Pa. St. 308; *Tyrrell L. & B. Asso. v. Haley*, 139 id. 477; *North Hudson &c. Asso. v. First Nat. Bank, (Wis.)* 47 N. W. Rep. 300; *Bowker v. Mill River L. F. Asso.*, 7 Allen (Mass.) 100; *Lister v. Log Cabin B. Asso.*, 38 Md. 115; *Edelyn v. Tascoe*, 22 Gratt. (Va.) 826; *Cason v. Seldner*, 77 Va. 293. Such an application can be made only by

a member: See *Bowker v. Mill River L. F. Asso., supra*; and all the members must be made parties: *Cason v. Seldner, supra.*

⁴⁸ For an intimation that a declaration by order of the board of directors that the shares are fully paid estops them from asserting the contrary, see *Mechanics' &c. B. Asso.'s App., (Pa.)* 7 Atl. Rep. 728; 6 Centr. Rep. 580.

⁴⁹ *Lister v. Log Cabin B. Asso.*, 38 Md. 115. See *supra*, § 8783, that members' mortgages are not assets for this calculation, and *Tyrrell L. & B. Asso. v. Haley*, 163 Pa. St. 301 (*supra* § 8703), for a rule in calculating the value of shares in serial societies. The value of the real estate may be estimated at the price paid for it at auction sale, though a greater may be shown: *Burns v. Metrop. B. Asso.*, 2 Mackey (D. C.) 7.

⁵⁰ *Cooper v. Oriental B. Asso.*, 100 Pa. St. 402; *Build. Asso. v. Anderson*, 7 Phila. (Pa.) 106; (except by virtue

judgment rendered in an action against it, where, pending such action, the association becomes dissolved by expiration of charter, is void, unless the suit has been continued against the proper parties.⁵¹ But a mortgage given by the association will not be avoided by such expiration where the association has transferred its property to the hands of an assignee or trustee.⁵² So far as concerns the members of the association, whether borrowers or investors, dissolution stops, at once, all liability for dues,⁵³ fines or interests.⁵⁴

§ 8796. **Effect of Dissolution or Abandonment as to Borrowers: Suspensions.**—The effect upon the borrowing members of a premature dissolution, or, what practically amounts to the same thing,⁵⁵ requires some notice. In return for the undertakings of the borrower in the transaction of loan or advancement as they have been pointed out,⁵⁶ there is an implied undertaking on the part of the association that the borrower shall have the advantage of the building association scheme in the liquidation of the whole of his indebtedness; *i. e.*, that it shall be by means of gradual payment, and that he shall participate, and have the opportunity of reducing his liability by his participation, in the profits of a continuing business, to be carried on to a fixed end.⁵⁷ Where, through bad management, financial misfortunes, loss of membership, or any other cause, the career of the association is brought to a premature close, the

of statutory authority: *Cooper v. Oriental B. Asso.*, *supra*, an act for that purpose not being obnoxious to a constitutional prohibition against creating, renewing or extending the charter of more than one corporation: *ibid.*) Nor, it would seem, prosecute a pending action: *Home B. & L. Asso. v. Van Pelt*, 94 Ga. 615; 21 S. E. Rep. 606 (see *ante*, § 8781 note).

⁵¹ *Endl., B. A.*, § 519.

⁵² *Kisterbock v. Building Asso.*, 7 Phila. (Pa.) 185. Whilst the assignee may defend against the enforcement of the mortgage, he cannot do so on the ground of the expiration of the society's charter: *ib.*

⁵³ *Binst v. Bryan*, 44 S. C. 121; 21 S. E. Rep. 537; *Cason v. Seldner*, 77 Va. 293; *Leahy v. Nat. B. & L. Asso.*, (Wis.) 76 N. W. Rep. 625; *Blakeley v. El Paso B. & L. Asso.*, (Tex.) 26 S. W. Rep. 292.

⁵⁴ *Cook v. Kent*, 105 Mass. 246;

Bowker v. Mill River L. F. Asso., 7 Allen (Mass.) 100; *Hinman v. Ryan*, 3 Ohio C. C. Rep. 529; *Knutson v. Northwest. L. & B. Asso.*, 67 Minn. 201; 69 N. W. Rep. 889; *Lumber B. & L. Asso. v. Winn*, 45 S. C. 381; 23 S. E. Rep. 29; *Endl., B. A.*, § 496.

⁵⁵ See *supra*, § 8791; *Endl., B. A.*, §§ 523–531.

⁵⁶ *Supra*, §§ 8772–8774.

⁵⁷ See *Strohen v. Franklin S. F. & L. Asso.*, 115 Pa. St. 273; *Low Street B. Asso. v. Zucker*, 48 Md. 448; *Waverly Mut. & C. B. Asso. v. Buck*, 64 id. 338; *Curtis v. Granite State Prov. Asso.*, 69 Conn. 6; 36 Atl. Rep. 1023; *Moran v. Gray*, (N. J.) 38 Atl. Rep. 668; *Strauss v. Carolina Interst. B. & L. Asso.*, 117 N. C. 308; 23 S. E. Rep. 450; *Towle v. Amer. B., L. & Inv. Soc.*, 61 Fed. Rep. 446; *Leahy v. Nat. B. & L. Asso.*, (Wis.) 76 N. W. Rep. 625; *Building & Loan News*, Feb. & Oct., 1889; *Endl., B. A.*, § 523.

borrower is compellable forthwith to pay the balance due from him on his security, although in terms only given for installments.⁵⁸ He is, therefore, deprived of some proportion of the advantages, the prospect of which induced him to assume the burden of his original obligation. There remains nothing to compensate him for his liability to make up the premiums, to keep up stock payments, to pay fines, etc. The consideration of the liability failing, the liability itself must, in a proportionate degree, fail also. In other words, there remains, on the one side a claim, on the other a liability, to be measured simply by the amount of money actually advanced. In such case, therefore, all the borrower can be held for (on the theory of a rescission of at least part of his contract⁵⁹ and remitting the parties, as to the rest, to the position of the ordinary lender and borrower)⁶⁰ is the amount received by him from the association, with legal interest.⁶¹ Upon this point nearly all the authorities agree.⁶² Some of them also declare the borrower to be entitled to a deduction, from this amount, of all periodical payments of dues and interest made by him.⁶³ In others it is declared

⁵⁸ *Kemp v. Wright*, [1894] 2 Ch. 462; *Brownlie v. Russell*, 8 App. Cas. 235; *Curtis v. Granite State Prov. Asso.*, *supra*; *Leahy v. Nat. B. & L. Asso.*, (Wis.) 76 N. W. Rep. 625; *Strauss v. Carolina Interst. B. & L. Asso.*, *supra* (but it is there said that the mortgages cannot be foreclosed by the receiver under a power given therein to the corporation: See *In re Rumney & Smith*, [1897] 2 Ch. 351 (*ante*, § 8781, note); *Towle v. Amer. B., L. & I. Soc.*, *supra*; *Strohen v. Franklin S., F. & L. Asso.*, *supra*.

⁵⁹ *Knutson v. Northwest. L. & B. Asso.*, 67 Minn. 201; 69 N. W. Rep. 889.

⁶⁰ *Moran v. Gray*, (N. J.) 38 Atl. Rep. 668.

⁶¹ *In Sumter B. & L. Asso. v. Winn*, 45 S. C. 381; 23 S. E. Rep. 29, it seems to be held that the borrower from a society which closes its business before the term fixed in its charter, cannot be held for any payments coming due thereafter, but, in a proceeding to foreclose his mortgage, will be entitled to judgment against the society for usurious interest paid.

⁶² Except *Towle v. Amer. B., L. & I. Soc.*, 61 Fed. Rep. 446; and *Sullivan v. Stucky*, 86 id. 491, where, in

addition, a proportion of the premiums is allowed the society. See, however, cases cited in succeeding notes. The decision in *Hekelukaemper v. German B. & S. Asso.*, 22 Kan. 549, is not an authority *contra*. The transaction was treated as a mere loan and the premium bid excluded. That in *Watkins v. Workingmen's B. & L. Asso.*, 97 Pa. St. 514, is inapplicable, because the borrower in that case had defaulted, and thereby made himself liable for the whole face of his obligation: *Hinman v. Ryan*, 3 Ohio Circ. Ct. 529; and *People v. Lowe*, 117 N. Y. 175; 22 N. E. Rep. 1016, are not valuable as precedents on this question turning upon their own peculiar facts. In *Goggins v. Kelly*, (Tex.) 25 S. W. Rep. 1133, a building association which, before insolvency, had permitted borrowers to settle upon certain terms, was held estopped afterwards, in the hands of a receiver, from refusing to settle with other borrowers upon the same basis when they had acted upon the rule. Compare *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428; *supra*, § 8786, note.

⁶³ *Cook v. Kent*, 105 Mass. 246; *Windsor & Applegarth v. Baudell*, 40 Md. 172; *Hampstead B. Asso. v.*

that the borrower shall be required to pay back what he has actually received, with interest, and without deduction on account of any stock payments,⁶⁴ and that he will then be entitled, after the debts of the association have been paid, to a *pro rata* dividend, alike with the non-borrowing stockholders, upon what he has paid into the association as dues.⁶⁵ When it is remembered that the borrower still rests under the membership liability⁶⁶ to contribute towards the losses and expenses of the association,⁶⁷ it is clear that the former of these methods cannot be correct; for by it, he will escape some part of his share of the losses. But, on the other hand, the hardship and increased expense of settlement which may result from requiring the borrower to pay back all that he has received, without any credit for the dues he has paid in, remitting him to final distribution for a return of the excess of his payment over what shall be found justly due from him, would seem to indicate the propriety of a third method, wherever practicable,—viz., to ascertain what the receipts, profits and losses of the society have been, what its liabilities are, what available assets are on hand, and what,

King, 58 id. 279; Waverly &c. B. Asso. v. Buck, 64 id. 388; Low Str. B. Asso. v. Zucker, 48 id. 448; St. Peter's B. Asso. v. Jaacksch, 51 id. 198; City L. & B. Asso. v. Goodrich, 48 Ga. 445; Goodrich v. City L. & B. Asso., 54 id. 98; Binst v. Bryan, 44 S. O. 121; 21 S. E. Rep. 537.

⁶⁴ As to the different effect of a "definite payment" contract, in its inception calling for the appropriation, in reduction of the borrower's liability, of all stock payments as made by him, see York Trust &c. Co. v. Gallatin, 186 Pa. St. 150; *ante*, § 8787, note.

⁶⁵ Strohen v. Franklin S. F. & L. Asso., 115 Pa. St. 273; Rogers v. Hargo, 92 Tenn. 35; Post v. Mechanics' B. & L. Asso., 97 id. 408; 37 S. W. Rep. 216; Carpenter v. Richardson, (Tenn.) 46 S. W. Rep. 452; Leahy v. Nat. B. & L. Asso., (Wis.) 76 N. W. Rep. 625; See also Curtis v. Granite State Provid. Asso., 69 Conn. 6; Moran v. Gray, (N. J.) 38 Atl. Rep. 668; Weir v. Granite State Provid. Asso., (N. J.) 38 id. 643; Rogers v. Raines, (Ky.) 38 S. W. Rep. 483; Price v. Kendall, (Tex.) 36 id. 810; Thompson v. North Carolina B. & L. Asso., 120 N. C. 420; 27 S. E. Rep. 118 (compare Strauss v. Carolina Interstate B.

& L. Asso., 117 N. C. 308; 23 S. E. Rep. 450. The decisions in Towle v. Amer. B., L. & Inv. Soc., 61 Fed. Rep. 446; and Sullivan v. Stucky, 86 id. 491, agree with this line of cases, except that they do not allow the borrower credit for the whole, but only for a portion (the "unearned" portion) of the premium.

⁶⁶ Where a borrower's mortgage stipulated, *inter alia*, for payment of such "assessments" as might be levied on the mortgagor as a member, and the society, having sustained losses, went into the hands of a receiver, who made an assessment to meet the shortage, it was held that the same was within the above stipulation. that the borrower was not entitled to cancellation of the mortgage until the assessment was paid, and that the receiver was the proper person to ascertain the losses and make the assessment: Eversmann v. Schmitt, 53 Ohio St. 174; 41 N. E. Rep. 139.

⁶⁷ *Ante*, §§ 8721, 8735. Of course, the borrowing members cannot be charged with the making up of such losses, etc., for the benefit of the non-borrowing ones: Low Str. B. Asso. v. Zucker, 48 Md. 448; People v. Lowe, 117 N. Y. 175; 22 N. E. Rep. 1016.

accordingly, is the present real value of every share, making allowance for the expenses of settlement; to credit that amount on the borrower's debt, in respect of each share held by him; and, charging him with the sum actually advanced to him and interest, reduced by part payments of interest and premiums,⁶⁸ collect from him only the balance.⁶⁹ The consequences indicated as following a technical or practical dissolution of a building association, in respect of its members and borrowers, will not, however, attend a mere temporary suspension of its business; which, on the contrary, affords the borrower no ground of defense against the enforcement of his obligation,⁷⁰ any more than will an embarrassed condition of its affairs by reason of the refusal of any number of its members to continue their stock payments.⁷¹

§ 8797. **Foreign Building Associations: Contracts: Receivers.**—The right of a foreign building association,⁷² *i. e.*, one incorporated in another State, to do business in any State other than that of its creation, and the validity of its acts when questioned in such State, are, in general, regulated by the same principle which apply in case of foreign corporations generally.⁷³ It has been decided that a foreign building association which fails to comply with the statutes of a State, requiring the filing of certain statements, etc., with the auditor or

⁶⁸ And fines: *Thompson v. North Carolina B. & L. Asso.*, 120 N. C. 420; 27 S. E. Rep. 118.

⁶⁹ *Endl., B. A.*, § 531; And see *Knutson v. Northwest. L. & B. Asso.*, 67 Minn. 201; 69 N. W. Rep. 889, where it is said that each member, on insolvency and winding up, is to receive back what he has paid and pay back what he has gotten, each bearing his share of the common losses, and that a borrowing member is accordingly liable to have retained out of what he has paid, a sufficient amount to cover his liability for losses and expenses, being allowed to set off the balance against his indebtedness. Of course, he has no right to have his mortgage canceled until it is definitely ascertained that he is not liable to any further assessments; and on the other hand, he will be entitled to a dividend on final distribution if the amount charged against him is found to be excessive. An assignee of a mortgage given to a building as-

sociation, which, through insolvency, becomes unable to perform its contract with the mortgagor, is subject to the same disabilities and conditions which affect the society, respecting the enforcement of the security: *Rochester Sav. Bk. v. Whitmore*, 49 N. Y. Supp. 862.

⁷⁰ *Johnston v. Elizabeth B. & L. Asso.*, 104 Pa. St. 394; *Thompson v. Ocmulgee B. & L. Asso.*, 56 Ga. 350.

⁷¹ *Hoboken B. Asso. v. Martin*, 13 N. J. Eq. 428. Though tending to increase his burdens, this is one of the risks of loss he assumes by his contract.

⁷² Members of such are presumed to have notice of its by-laws: *Nickels v. Asso.*, 93 Va. 380; 35 S. E. Rep. 8.

⁷³ As to the constitutionality of a statute requiring foreign building associations doing business in the State to pay to it a percentage of its gross receipts, see *Southern B. & L. Asso. v. Norman*, 98 Ky. 294; 32 S. W. Rep. 952.

other official, may lend money in that State and sue in its courts for the foreclosure of a mortgage securing the loan; but its recovery herein will be restricted to principal and interest, together with taxes paid to protect the lien, whilst premiums and other dues allowed under its by-laws cannot be collected.⁷⁴ On the other hand a mortgage taken by a foreign society in that situation has been held to be illegal and unenforceable,⁷⁵ though, it is added, a court of equity will not remove it as a cloud upon the mortgagor's title, except upon condition of payment of what is justly due thereon.⁷⁶ A statute of the kind referred to has been declared inapplicable to such foreign associations as have no local agencies, but make their contracts direct from the home office.⁷⁷ Such contracts, indeed, when solvable in the State of the society's origin, although secured by mortgages on land in another State, are, according to the undoubted weight of authority, to be treated as made with reference to, and as governed by, the laws of the State to which the society belongs, and as enforceable or unenforceable accordingly as they are sanctioned by those laws or not.⁷⁸ Of course, where the contract shows that both parties intended it to be performed in the

⁷⁴ Maine Guarantee Co. v. Cox, 146 Ind. 107; 42 N. E. Rep. 915; Nat. L. & Inv. Co. v. Stone, (Tex.) 46 S. W. Rep. 67.

⁷⁵ Although the application for the loan was made and the latter promised before the passage of the statute in question: see cases in next note.

⁷⁶ New York Nat. B. & L. Asso. v. Cannon, (Tenn.) 41 S. W. Rep. 1054 (in this case, where the society had imposed unjust dues and fines and exacted them as a condition of discharge, the amount received by the borrower, without interest); Illinois B. & L. Asso. v. Walker, (Tenn.) 42 S. W. Rep. 191.

⁷⁷ Neal v. New South B. & L. Asso., (Tenn.) 46 S. W. Rep. 755. Where there is a local branch, it is said that a tender is properly made by a borrower to the local secretary and treasurer: Smith v. Old Dominion B. & L. Asso., 119 N. C. 257; 26 S. E. Rep. 40.

⁷⁸ U. L. S. & L. Co. v. Miller, (Tenn.) 47 S. W. Rep. 17; Pioneer S. & L. Co. v. Cannon, 96 Tenn. 599; 36 S. W. Rep. 386; Bennett v. Eastern B. & L. Asso., 177 Pa. St. 233;

Larwell v. Hanover S. F. Soc., 40 Ohio St. 274; Sawtelle v. North Amer. S., L. & B. Co., 14 Utah, 443; 48 Pac. Rep. 211; People's B., L. & S. Asso. v. Fowble, 53 Pac. Rep. 999; Nat. Mut. B. & L. Asso. v. Ashworth, 91 Va. 706; 25 S. E. Rep. 521; Ware v. Bankers' L. & Inv. Co., (Va.) 29 S. E. Rep. 744; Equitable B. & L. Asso. v. Vance, 49 S. C. 402; 27 S. E. Rep. 274; 29 id. 204; Same v. Hoffman, 50 S. C. 303; 27 S. E. Rep. 692; Tobin v. McNab, (S. C.) 30 S. E. Rep. 827; Pollock v. Carolina Interst. B. & L. Asso., (S. C.) 29 S. E. Rep. 77 (the borrower had the option to send his payments to the home office, or to make them at the local office while the society saw fit to maintain it, with the understanding that the local agents were *his* agents in receiving the money.) In U. S. S. & L. Asso. v. Scott, 98 Ky. 695; 34 S. W. Rep. 235, and Pryse v. People's B., L. & S. Asso., (Ky.) 41 S. W. Rep. 574, it was held that a loan by a foreign building association, dated and made payable in a foreign State, is governed by the laws of the State in which the land is situated wherever the loan is secured by mortgage.

State whose courts are asked to enforce it, though, in terms, it is made solvable elsewhere, it will be treated as a domestic contract;⁷⁹ for no mere device to evade the usury laws of a State will avail to make a contract a foreign one.⁸⁰ But where a building association undertakes to do business in a State other than that of its creation, whilst a contract made by it in the former State, sanctioned by the statute under which the society was organized, will not be deemed unlawful in the State in which it was made and is sought to be enforced when it would not be so if made by an association of that State.⁸¹ Yet, such an association acts and does business in such State (even when duly licensed) subject to its laws and regulations as applied to its own domestic associations by virtue of its statutes and decisions, and will not be permitted to have or exercise any greater or different powers than, but be held to the same liabilities, restrictions and duties as, domestic ones.⁸² Under this view, moreover, it is deemed legitimate to test the character of a foreign corporation assuming to act as a building association by reference to the laws of the State in which it so assumes to act, and to deny it that character, if, by such comparison, its nature and powers are found to be different from and in excess of what the laws and policy of that State recognize as belonging to such associations; with the result that contracts permitted to such associations, but unlawful to others, will not be accepted as valid when set up by foreign associations not properly classifiable as building associations according to that criterion.⁸³ And again it has been laid down that a contract with a foreign building association, though permitted by the laws of the State in which it was incorporated, will not be

⁷⁹ *Crenshaw v. Hedrick*, (Tex.) 47 S. W. Rep. 71. But where the parties enter into a contract lawful in the State of the society's creation, but unlawful in that of the borrower's residence, the presumption is they contracted with reference to the laws of the former, not that they intended to evade the law of the latter; and the fact that the company has the right to contract in the latter and has a branch office there, does not overcome that presumption: *Ware v. Bankers' L. & I. Co.*, *supra*.

⁸⁰ *Build. & L. Asso. v. Griffin*, 90 Tex. 480; 39 S. W. Rep. 656; such, e. g., as writing a contract really made by a local branch of a foreign society, through which business is transacted

in a State, solvable in the home State: *Southern B. & L. Asso. v. Riggle*, 4 Pa. Dist. Rep. 617.

⁸¹ *Freie v. Fidelity B. & S. Union*, 166 Ill. 128; 46 N. E. Rep. 784.

⁸² *Granite State Prov. Asso. v. Lloyd*, 145 Ill. 620; 34 N. E. Rep. 142; *St. Louis L. & Inv. Co. v. Yantis*, 173 Ill. 321; 50 N. E. Rep. 807 (these cases refer to the right of withdrawal, the one last mentioned holding that a resident member of a foreign association is entitled to the withdrawal value of shares according to the laws of his State).

⁸³ *Rhodes v. Missouri S. & L. Co.*, 173 Ill. 621; 50 N. E. Rep. 998; *Meroney v. Atlanta Nat. B. & L. Asso.*, 116 N. C. 922; 21 S. E. Rep. 924.

enforced elsewhere, when it is manifestly unconscionable and unjust.⁸⁴ When a foreign building association breaks up insolvent, the appointment of a receiver by a State court has no extra-territorial force,⁸⁵ but a resident receiver may be appointed in any State in which interests of residents are to be protected;⁸⁶ and securities deposited by a foreign society with the officials of the State as a condition upon which it is permitted to do business there, will be controlled by the courts of that State, so as to secure payment of amounts awarded to resident shareholders on final distribution of the assets.⁸⁷

⁸⁴ *Rowland v. Old Dominion B. & L. Asso.*, 115 N. C. 825; 18 S. E. Rep. 965; s. c., 116 N. C. 877; 22 S. E. Rep. 8; s. c., 118 N. C. 173; *Randall v. Nat. B., L. & T. Union*, 43 Neb. 876; 62 N. W. Rep. 252 (in both of which cases a forfeiture of the borrower's stock without giving him any credit for its value was disallowed, though permitted by the statutes of the States in which the respective associations were incorporated); *Southern B. & L. Asso. v. Harris*, 98 Ky. 41; 32 S. W. Rep. 261 (where an agreement by a member of a foreign building association by which he was to pay monthly dues on stock he was forced to take and 6 per cent. interest on the principal of his loan, on which he was to make monthly partial payments, so that for the last month his interest payment would be at the rate of 500 per cent., was held unenforceable); *Rogers v. Raines*, (Ky.) 38 S. W. Rep. 483 (where a stipulated attorney fee was held uncollectible).

⁸⁵ *Southern B. & L. Asso. v. Price*, (Md.) 41 Atl. Rep. 53.

⁸⁶ *Irwin v. Granite State Prov. Asso.*, (N. J.) 38 Atl. Rep. 680: such receiver being amenable to the direction of the court appointing him, not to the court appointing the domiciliary receiver: *ibid.* And whether the latter is to be appointed by the court of another State will depend upon the volume and kind of business done there by the society, and upon whether special interests of creditors or citizens are likely to be involved in the settlement of its affairs: *ibid.*

⁸⁷ *Ibid.* The society cannot question the validity of the trust on which, e. g., the State Treasurer holds such securities for the benefit of resident members, and by giving them preference the members of the foreign society waive the constitutional provision as to impairment of contracts: *Lewis v. Amer. S. & L. Asso.*, (Wis.) 73 N. W. Rep. 793.

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